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In the

Supreme Court of the United States

OCTOBER TERM, 2000

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, et al.,

PETITIONERS,

v.

DONALD K. STERN, in his Official Capacity as United States Attorney for the District of Massachusetts,

RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Citizens Protection Act, 28 U.S.C. § 530B, binds federal prosecutors to all state rules governing attorneys, even if those rules are inconsistent with other federal laws or rules.

2. Whether, under 28 U.S.C. § 46(c) and Fed. R. App. P. 35(a), a judge in regular active service on a federal Court of Appeals, who has recused herself from consideration of a petition for rehearing en banc, should be counted among the number of the judges in regular active service of the Court for purposes of determining the majority necessary to grant the petition.

PARTIES TO THE PROCEEDING

Donald K. Stern, in his Official Capacity as United States Attorney for the District of Massachusetts

Daniel C. Crane, in his Official Capacity as Bar Counsel for the Board of Bar Overseers

United States District Court for the District of Massachusetts

William G. Young, in his Official Capacity as United States District Court Judge for the District of Massachusetts

Robert E. Keeton, in his Official Capacity as United States District Court Judge for the District of Massachusetts

Rya W. Zobel, in her Official Capacity as United States District Court Judge for the District of Massachusetts

Joseph L. Tauro, in his Official Capacity as United States District Court Judge for the District of Massachusetts

Mark L. Wolf, in his Official Capacity as United States District Court Judge for the District of Massachusetts

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Edward F. Harrington, in his Official Capacity as United States District Court Judge for the District of Massachusetts

Nathaniel M. Gorton, in his Official Capacity as United States District Court Judge for the District of Massachusetts

Richard G. Stearns, in his Official Capacity as United States District Court Judge for the District of Massachusetts

Reginald C. Lindsay, in his Official Capacity as United States District Court Judge for the District of Massachusetts

Patti B. Saris, in her Official Capacity as United States District Court Judge for the District of Massachusetts

Nancy Gertner, in her Official Capacity as United States District Court Judge for the District of Massachusetts

Michael A. Ponsor, in his Official Capacity as United States District Court Judge for the District of Massachusetts

George A. O'Toole, Jr., in his Official Capacity as United States District Court Judge for the District of Massachusetts

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PETITION FOR A WRIT OF CERTIORARI

The defendants in this action, the United States District Court for the District of Massachusetts and each of the active judges of the District Court (collec-

tively, the "Judges"), petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The decision of the Court of Appeals is reported at 214 F.3d 4 and is reproduced in the Appendix to this Petition ("Pet. App.") at A22. The Court of Appeals' denial of the Judges' petition for rehearing en banc is reported at 214 F.3d 21 and is reproduced at Pet. App. A53. The District Court's opinion granting summary judgment in favor of the Judges is reported at 184 F.R.D. 10 and is reproduced at Pet. App. A1.

JURISDICTION

The judgment of the Court of Appeals was entered on April 12, 2000. The Court of Appeals entered an order denying the Judges' petition for rehearing en banc on June 22, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Citizens Protection Act, codified at 28 U.S.C. § 530B, provides in pertinent part:

> An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.

Rule 3.8(f) of the Massachusetts Rules of Professional Conduct provides:

> The prosecutor in a criminal case shall not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless:
>
> (1) the prosecutor reasonably believes:
>
> (i) the information sought is not protected from disclosure by any applicable privilege;
>
> (ii) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
>
> (iii) there is no other feasible alternative to obtain the information; and
>
> (2) the prosecutor obtains prior judicial approval after an opportunity for an adversarial proceeding.

Title 28, U.S.C., § 46(c) provides in pertinent part:

> Cases and controversies shall be heard and determined by a court or panel of not more than three judges . . . unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service . . . .

Fed. R. App. P. 35(a) provides in pertinent part:

> A majority of the circuit judges who are in regular active service may order that an appeal or

other proceeding be heard or reheard by the court of appeals en banc.

STATEMENT OF THE CASE

This case concerns whether federal prosecutors are subject to the same state rules governing attorney conduct as other attorneys within a state. The U.S. Attorney for the District of Massachusetts sued the Judges for declaratory and injunctive relief, contending that the prosecutors in his office are exempt from a particular state ethics rule, Rule 3.8(f) of the Massachusetts Rules of Professional Conduct, that governs the service of subpoenas on attorneys by prosecutors. The District Court (Brody, J., of the District of Maine) rejected the U.S. Attorney's position and denied his request for relief. The First Circuit reversed and, in so doing, misinterpreted the scope of the Citizens Protection Act, 28 U.S.C. § 530B, in conflict with a holding of the Tenth Circuit. The First Circuit subsequently denied en banc review, despite the fact that three of the five judges voting on the petition voted in favor of granting rehearing. The Judges now petition this Court for review.

On January 1, 1998, the Commonwealth of Massachusetts enacted a new ethical rule relating to subpoenas served on lawyers by prosecutors. The rule, Rule 3.8(f) of the Massachusetts Rules of Professional Conduct, provides that a prosecutor shall not subpoena a lawyer to present evidence regarding a past or present client (an "Attorney Subpoena") unless the prosecutor: (1) has a reasonable belief that the information sought is essential, not privileged, and not available by alternative means; and (2) obtains prior judicial approval after an opportunity for an adversar-

ial proceeding.[1] Rule 3.8(f) simultaneously became part of the Local Rules of the United States District Court for the District of Massachusetts (the "Local Rules") by operation of Local Rule 83.6(4)(B).[2]

Rule 3.8(f)'s incorporation into the Local Rules occurred against the backdrop of a longstanding dispute between the Department of Justice and the federal courts over the rules of conduct applicable to government lawyers. In the interests of federal-state comity and to avoid subjecting attorneys to conflicting ethics rules, 80 of the 94 federal district courts have, like the District of Massachusetts, incorporated state ethics rules into their local rules rather than draft separate rules of their own. *See* Working Papers of the Committee on Rules of Practice and Procedure, *Special Studies of Federal Rules Governing Attorney Conduct* 337 (1997). The Department of Justice, however, has long contested the authority of the state and federal courts to apply general rules governing attorney ethics to the activities of government attorneys. *See* Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 Geo. L.J. 207, 209 (2000) (describing "national debate over the authority of the Department of Justice to exempt itself from state and federal district court ethics rules").

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[1] Rule 3.8(f), along with the rest of the Massachusetts Rules of Professional Conduct, is located within Chapter Three of the Rules of the Supreme Judicial Court, entitled "Ethical Requirements and Rules Concerning the Practice of Law." The full text of Rule 3.8(f) can be found on pages 2 & 3 of this petition.

[2] Local Rule 83.6(4)(B) provides: "Acts or omissions by an attorney admitted to practice before this court . . . that violate the ethical requirements and rules concerning the practice of law of the Commonwealth of Massachusetts, shall constitute misconduct and shall be grounds for discipline . . . . The ethical requirements and rules concerning the practice of law mean those canons and rules adopted by the Supreme Judicial Court of Massachusetts . . . as they may be amended from time to time by said court, except as otherwise provided by specific rule of this court . . . ."

While this case was pending before the District Court, Congress undertook to settle the debate over regulation of federal prosecutors by passing the Citizens Protection Act, now codified at 28 U.S.C. § 530B. The Act directly applies state "laws and rules . . . governing attorneys" to federal prosecutors practicing in each state. 28 U.S.C. § 530B. Thus, regardless of whether a federal district court has adopted a local rule incorporating the attorney conduct rules of the state in which it sits, the Citizens Protection Act requires federal prosecutors practicing in a particular state to abide by that state's conduct rules.

A. The District Court Proceeding

In response to the incorporation of Rule 3.8(f), the U.S. Attorney for the District of Massachusetts, Donald K. Stern, imposed a moratorium on applications for Attorney Subpoenas. Five months later, Stern filed a complaint in the U.S. District Court for the District of Massachusetts seeking both an injunction against the application of Rule 3.8(f) to federal prosecutors and a declaratory judgment that Rule 3.8(f), as incorporated into the Local Rules, is beyond the limits of the Judges' rulemaking authority. The complaint named as defendants the Supreme Judicial Court for the Commonwealth of Massachusetts, the Board of Bar Overseers, Bar Counsel, and the U.S. District Court for the District of Massachusetts.[3]

In his complaint, Stern argued that Rule 3.8(f) was beyond the Judges' rulemaking power because it imposed new substantive requirements for judicial pre-approval of grand jury subpoenas and interfered with grand jury proceedings in a manner not contem-

[3] Stern subsequently amended his complaint to add as defendants the individual active judges of the U.S. District Court for the District of Massachusetts.

plated or permitted by Fed. R. Crim. P. 17(c).[4] Stern further argued that, outside of the grand jury context, Rule 3.8(f) was beyond the District Court's rulemaking power because Fed. R. Crim. P. 57 permits district courts to promulgate local rules only with respect to "matters of detail."[5] Stern contended that Rule 3.8(f)'s substantive and procedural requirements went beyond Rule 57's limits.

Because the District Judge originally assigned to the case was named as a party defendant, the case was transferred to Judge Morton Brody of the U.S. District Court for the District of Maine, sitting by designation. On June 18, 1998, Bar Counsel filed an affidavit stating that he would not initiate any action against a federal prosecutor in state court or before the Board of Bar Overseers for an alleged violation of Rule 3.8(f) in connection with a proceeding in federal court. In light of Bar Counsel's affidavit, Stern voluntarily dismissed his claims against the Board of Bar Overseers and the Supreme Judicial Court.

The District Court issued a ruling denying Stern's request for declaratory and injunctive relief. The District Court rejected Stern's challenge to the Judges' adoption of Rule 3.8(f)(1)'s "ethical criteria." Pet. App. at A19. Citing the First Circuit's prior decision in *Whitehouse* v. *United States District Court*, 53 F.3d 1349 (1st Cir. 1995), the Court ruled that district courts have:

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[4] Fed. R. Crim. P. 17(c) provides in pertinent part: "The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive."

[5] Fed. R. Crim. P. 57(a)(1) provides in pertinent part: "Each district court acting by a majority of its district judges may . . . make and amend rules governing its practice. A local rule shall be consistent with–but not duplicative of–Acts of Congress and rules adopted under 28 U.S.C. § 2072 . . . ."

> the power to adopt ethical rules governing attorneys so long as they do not violate the Constitution or statute. Neither [Stern's] opinion concerning the wisdom and necessity of Rule 3.8(f) nor his speculation regarding its consequences are grounds for invalidating its adoption. Moreover, the enactment of [the Citizens' Protection Act] signals Congress' belief that the Department of Justice guidelines are insufficient and its desire that the states and the federal courts play a greater role in governing the conduct of government attorneys.

Pet. App. at A20 (citation omitted).

In addition, the District Court reviewed the attorney-subpoena rules that applied to federal prosecutors in Massachusetts prior to adoption of Rule 3.8(f). The District Court noted that between November 1993 and September 1997, in compliance with Rule 3.8(f)'s predecessor, Prosecutorial Function 15 ("PF 15"), the Massachusetts U.S. Attorney's Office had sought and received Justice Department authorization for issuance of approximately 199 Attorney Subpoenas - clear proof that the Department could carry out criminal investigations notwithstanding PF 15's ethical standards. Pet. App. at A6.

The District Court went on to hold that Rule 3.8(f) differs from PF 15 in only two respects:

> first, it lists three specific criteria [set forth in Rule 3.8(f)(1)] about which a prosecutor must have a reasonable belief before subpoenaing a lawyer; and second, it mandates [through Rule 3.8(f)(2)] an opportunity for an adversarial hearing.

Pet. App. at A9. The District Court disagreed with Stern that Rule 3.8(f) requires a prosecutor to "demonstrate the criteria enumerated in 3.8(f)(1) to secure the judicial approval of an attorney subpoena required by 3.8(f)(2)." Pet. App. at A13 (footnote omitted). The District Court held that since Rule 3.8(f) does not require that a judge determine whether a prosecutor has met Rule 3.8(f)(1)'s criteria prior to the issuance of an Attorney Subpoena, the Rule does not conflict with the statutes and procedural rules cited by Stern. Accordingly, the District Court denied Stern's requests for injunctive and declaratory relief. *Id* at A21.

B. The Court of Appeals Proceeding

Stern appealed the District Court's decision. On April 12, 2000, the First Circuit reversed, holding that because Rule 3.8(f) exceeded the Judges' rulemaking authority, the Rule is "without force or effect." Pet. App. at A52.

Disregarding the contrary interpretation of Rule 3.8(f) offered both by Bar Counsel (the state official responsible for the rule's enforcement) and the District Court, the First Circuit construed Rule 3.8(f) as mandating the application of the criteria outlined in Rule 3.8(f)(1) at the adversarial hearing referenced in Rule 3.8(f)(2). Pet. App. at A51. Rejecting the canon of construing local rules to avoid conflict with existing federal rules, *see, e.g., Jaroma* v. *Massey*, 873 F.2d 17, 20 (1st Cir. 1989) (per curiam); *United States* v. *White*, 980 F.2d 836, 844 (2nd Cir. 1992), the First Circuit adopted a construction of Rule 3.8(f) that it then held conflicted with Fed. R. Crim. P. 17(c) and 57. Pet. App. at A40-A48. Based on this conflict, the First Circuit invalidated Rule 3.8(f) as beyond the Judges' rulemaking authority.

In addition, the First Circuit held that the Citizens Protection Act neither mooted this case nor affected its outcome. *Id.* at A48-A51. Despite the plain language and legislative history of the Act, the First Circuit held that the Act does not subject federal prosecutors to state laws or rules governing attorney conduct that are inconsistent with existing federal laws or rules. *Id.* Based upon its holding that Rule 3.8(f) conflicts with Fed. R. Crim. P. 17(c) and 57, the First Circuit held that the Citizens Protection Act therefore does not extend to Rule 3.8(f). The First Circuit added that even if there were no such conflict, the Act would not encompass Rule 3.8(f) because the Act applies only to "ethical standards." Ignoring the test adopted by the Tenth Circuit for deciding whether a rule falls within the reach of the Citizens Protection Act, *see United States* v. *Colorado Supreme Court*, 189 F.3d 1281, 1287-88 (10th Cir. 1999), the First Circuit concluded that Rule 3.8(f) was "more than an ethical standard" and therefore not covered by the Act. Pet. App. at A51.

C. The Petition for Rehearing En Banc

The Judges and Bar Counsel subsequently filed separate petitions for rehearing en banc. On June 22, 2000, the active judges of the First Circuit voted 3-2 in favor of rehearing the case en banc, with the Court's sixth active judge recusing herself. The Court of Appeals nevertheless determined that under 28 U.S.C. § 46(c) and Fed. R. App. P. 35(a), there were insufficient votes to grant the petitions. Despite the language of the rule and statute that a "majority" in favor of rehearing suffices, the First Circuit followed its previous precedent that, regardless of how many judges are recused from the voting, no fewer than four of the circuit's six active judges must vote in favor of a peti-

tion in order for rehearing en banc to occur. Pet. App. at A54 (citing *United States* v. *Leichter*, 167 F.3d 667, 667 (1st Cir. 1999)).

The three judges who voted in favor of rehearing en banc dissented from the denial of the petitions. The dissent noted that the panel opinion constituted a reversal of the First Circuit's decision in *Whitehouse*, in which the court's "central ruling . . . [was] that a district court has the authority to regulate prosecutors' conduct qua members of the bar, as in the case of any other members of the bar." Pet. App. at A55. The dissenters concluded that, as a result, the panel opinion "contravenes sound and well-established legal principles regarding the binding nature of panel opinions upon later panels considering the same or closely similar issues." *Id.* at A54. The three dissenting judges also noted that "the prudent exercise of [] supervisory powers over the bar" is "central to the district court's ability to administer justice." *Id.* at A56. Accordingly, the dissenters argued, the issues raised by the petition were "'question[s] of exceptional importance' meriting a rehearing en banc by the full court." *Id.* at A57.

REASONS FOR GRANTING THE WRIT

I. THE SCOPE OF THE CITIZENS PROTECTION ACT IS A QUESTION OF NATIONAL IMPORTANCE THAT SHOULD BE SETTLED BY THIS COURT.

This Court should grant the writ in order to provide much-needed guidance to federal judges and prosecutors nationwide regarding the scope of the Citizens Protection Act, 28 U.S.C. § 530B. This case raises a fundamental question concerning the scope of the Act, namely whether the Act binds federal prosecutors to

follow all state rules governing attorneys, or only those rules that do not conflict with other federal statutes or rules. Without guidance from this Court, it will remain unclear which rules "governing attorneys" federal prosecutors are bound to follow in the thousands of criminal investigations and prosecutions that take place each year. This lack of clarity has already produced a split between the First and Tenth Circuits as to what constitutes a rule "governing attorneys" under the Act. Without assistance from this Court, confusion over prosecutors' ethical obligations will continue to disrupt the administration of justice nationwide.

A. The Citizens Protection Act binds federal prosecutors to follow all state rules governing attorney conduct, regardless of conflicts with other federal laws or rules.

The First Circuit mistakenly narrowed the Citizens Protection Act by holding that the Act does not require federal prosecutors to abide by state rules governing attorney conduct that are inconsistent with other federal law or rules. Contrary to what the First Circuit held, the Citizens Protection Act subjects federal prosecutors to all state rules governing attorneys, even if those rules conflict with pre-existing federal law. The Act provides that federal prosecutors shall be subject to "State laws and rules . . . governing attorneys in each State where such [prosecutor] engages in [his or her] duties, *to the same extent and in the same manner as other attorneys in that State*." 28 U.S.C. § 530B(a) (emphasis added). State prosecutors are subject to rules such as Rule 3.8(f) regardless of whether the rules, if adopted as local rules by a federal district court, would be outside the scope of the district court's rulemaking authority. Thus, under the plain language

of the Act, any potential conflict between a state rule and a pre-existing federal law is irrelevant. Federal prosecutors must follow state laws and rules "governing attorneys . . . to the same extent and in the same manner" as state prosecutors.

The history surrounding the Act's passage reveals that both Congress and the Department of Justice understood that this was the purpose of the Act. The Department of Justice had long acknowledged that states possessed the authority to regulate the conduct of government attorneys "if the regulation [did] not conflict with the federal law or with the attorneys' federal responsibilities." Richard L. Thornburgh, *Memorandum from Attorney General to All Justice Department Litigators*, June 8, 1989 (hereinafter, "Thornburgh Memo"), reprinted in *In re Doe*, 801 F. Supp. 478, 489 (D.N.M. 1992). The Citizens Protection Act sparked vociferous debate precisely because it went beyond existing Department of Justice policy. As the legislators debating the Act well understood, the Act was important because it was designed to subject government attorneys to *all* state rules of attorney conduct. *See* 144 Cong. Rec. S12996 (Nov. 12, 1998) (statement of Senator Abraham) (warning that, under the bill, state rules such as those "requiring prior judicial approval of subpoenas of attorneys . . . will indeed govern prosecutors' conduct"); 144 Cong. Rec. S12799 (Oct. 21, 1998) (statement of Senator Hatch) (noting that the bill had potential to impact "conduct of matters before a grand jury"). If the Act had been meant to require federal prosecutors to follow only those rules that did not conflict with federal law, it would have been a meaningless restatement of existing law.

Congress was determined to allow for localized oversight of federal prosecutors. Although the Act refers broadly to "government attorneys," it was most direct-

ly aimed at federal prosecutors. *See* Ethical Standards for Federal Prosecutors Act of 1996: Hearing on H.R. 3386 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 104th Cong. 7 (1996) (statement of Representative McDade) ("[W]e need to ensure that our Federal prosecutors act with the highest possible ethics. . . . I introduced this bill because I believe that they should be accountable, as all other lawyer[s] in this country are, to charges of misconduct and to ethical standards."). It is particularly rules like Rule 3.8(f), a rule specifically governing state prosecutors, that the Act intended to make applicable at the federal level, regardless of any conflict with pre-existing federal law.

Review of the Act's scope is appropriate at this point in time because interpretation of the Act potentially bears on thousands of federal criminal investigations and prosecutions nationwide. The need for this Court's guidance is not just abstract, but practical — need to know which rules "governing attorneys" they are required to follow. Continued confusion in this area readily could impede criminal investigations and prosecutions. By granting the petition, the Court will end that confusion and avoid the piecemeal filing of actions throughout the country questioning the scope of the Act.

B. The First Circuit's holding conflicts with the Tenth Circuit's holding in *Colorado Supreme Court.*

Granting the writ also would allow the Court to resolve a split between the First and Tenth Circuits regarding the proper test for evaluating whether a particular state or local federal rule falls within the reach of the Citizens Protection Act. In *United States*

v. *Colorado Supreme Court*, 189 F.3d 1281 (10th Cir. 1999), the Tenth Circuit considered whether Colorado's version of Rule 3.8(f) was an ethical standard applicable to government attorneys by operation of the Citizens Protection Act.[6] The Tenth Circuit framed the issue as "whether the version of Rule 3.8 before [the court] is one of those normative legal standards that guide[] the conduct of an attorney." *Id.* at 1285.

The Tenth Circuit employed a four-factor test to determine whether the Colorado rule was one governing conduct of attorneys. The Tenth Circuit considered whether the rule: (a) barred "conduct recognized by consensus within the profession as inappropriate"; (b) was "like a commandment dealing with morals and principles"; (c) contained "sweeping commandments of conduct . . . often . . . vague in its nature"; and (d) was "directed at the attorney herself." *Id.* at 1287. The Tenth Circuit held that the Colorado rule was one "governing attorneys"; accordingly, under the Citizens Protection Act, the Colorado rule applied to government attorneys practicing in the District of Colorado – regardless of whether the U.S. District Court for the District of Colorado could have promulgated the rule on its own. *Id.* at 1286.

Under the test employed in *Colorado Supreme Court,* Massachusetts Rule 3.8(f) is also "one of those normative legal standards that guide[] the conduct of an attorney." *Id.* at 1285. First, the rule is one of the Massachusetts Rules of Professional Conduct, the

[6] The rule considered in Colorado Supreme Court differs from the Massachusetts formulation of Rule 3.8(f) in two ways: it contained no provision for a prior adversarial hearing and it applied only to trial subpoenas, not to grand jury subpoenas as well. Here, the First Circuit held that the Massachusetts version of Rule 3.8(f) does not come within the scope of the Citizens Protection Act with respect to either grand jury proceedings or trial proceedings. Pet. App. at A52.

rules "governing attorneys" who practice law in Massachusetts. See Supreme Judicial Court Rules, Chapter Three (entitled "Ethical Requirements and Rules Concerning the Practice of Law"); *In re Karahalis*, 429 Mass. 121, 121 n.1, 706 N.E.2d, 655, 656 n.1 (1999) (noting that Massachusetts Rules of Professional Conduct replaced former Canons of Ethics and Disciplinary Rules). Second, Rule 3.8(f) is in substance a rule "governing attorneys." Like the Colorado rule, Rule 3.8(f) bars conduct recognized by consensus within the profession as inappropriate, is written in commandment form, is vague enough to cover different variations of lawyer misconduct, and is directed at attorneys. *Colorado Supreme Court,* 189 F.3d at 1287-88.

The First Circuit declined to analyze Massachusetts Rule 3.8(f) under the test adopted by the Tenth Circuit. Instead, the First Circuit looked solely at whether Rule 3.8(f) included a "novel procedural step" that went beyond ethical standards. Pet. App. at A51. By rejecting the Tenth Circuit's four-factor test, the First Circuit improperly narrowed the reach of the Citizens Protection Act. This Court should grant the writ to resolve the split between the First and Tenth Circuits over the proper scope of the Act.

II. THE COURT SHOULD GRANT THE WRIT TO RESOLVE THE CIRCUIT SPLIT OVER WHETHER RECUSED JUDGES AFFECT THE NUMBER OF VOTES REQUIRED TO REHEAR A CASE EN BANC.

In denying the Judges' petition for rehearing en banc, the First Circuit interpreted 28 U.S.C. § 46(c) and Fed. R. App. P. 35(a) to require four of the circuit's six active judges to vote in favor of the petition before

it could be granted, even though one circuit judge had recused herself from consideration of the Judges' petition. This interpretation of § 46(c) and Rule 35(a) as requiring an "absolute majority" of votes, although shared by the Fourth, Fifth, Sixth, Eighth, District of Columbia, and Federal Circuits,[7] conflicts with the interpretation of the rule by the Second, Third, Seventh, Ninth, and Tenth Circuits that a "simple majority" will suffice.[8] The First Circuit's en banc vote-counting procedure should be reviewed by this Court in order to resolve the conflict among the courts of appeals and to promote national uniformity in the application of § 46(c) and Rule 35(a).

A uniform and effective en banc procedure is critical to the administration of the federal courts of appeals. It has long been recognized that, for each court of appeals, en banc hearings

> enable the court to maintain its integrity as an institution by making it possible for a majority of its judges always to control and thereby to secure uniformity and continuity in its decision, while enabling the court at the same time to follow the efficient and time-saving procedure of having panels of three judges hear and decide the vast majority of cases as to which no division exists within the court.

Hon. Albert Branson Maris, *Hearing & Rehearing Cases In Banc*, 14 F.R.D. 91, 96 (1954).

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[7] *See* Fourth Circuit Rule 35(b); Fifth Circuit Rule 35.6; *Clark* v. *ABC, Inc.*, 684 F.2d 1208, 1226 (6th Cir. 1982); *Ahlers* v. *Norwest Bank Worthington*, 794 F.2d 388, 415 (8th Cir. 1986) (dissent from denial of rehearing en banc); D.C. Circuit Handbook of Practice and Internal Procedures 145; Federal Circuit Rule 35(a)(1).

[8] *See* Second Circuit Rule 35; Third Circuit IOP 9.6; Seventh Circuit IOP 5(d)(1); Ninth Circuit General Order 5.5(d); Tenth Circuit Rule 35.5.

In addition to maintaining intra-circuit uniformity, the en banc procedure allows cases involving "a question of exceptional importance" to be decided by the full court of appeals. Fed. R. App. P. 35(a)(2). As this Court itself noted in upholding the validity of en banc review, considerations such as these "are especially important in view of the fact that in our federal judicial system [the courts of appeals] are the courts of last resort in the run of ordinary cases." *Textile Mills Sec. Corp.* v. *Commissioner*, 314 U.S. 326, 335 (1941). As a result of the dramatic increase in federal caseloads, this Court simply cannot address every important question of federal law raised by petitions for writs of certiorari. En banc review at the Court of Appeals level promotes the continuing development of the law and allows the resolution of important issues that this Court, due to resource constraints, is unable to address. The Court should grant this petition to ensure that the important procedural mechanism of en banc review enjoys a uniform and effective application throughout the federal courts of appeals.

Both § 46(c) and Rule 35(a) require the votes of "a majority of the circuit judges of the circuit who are in regular active service" to grant a petition for rehearing en banc. In nearly forty-year-old dicta, this Court implicitly rejected the argument that the language of § 46(c) compels a specific method of vote-counting for determining whether a majority of judges in regular active service have ordered rehearing. *See Shenker* v. *Baltimore & Ohio Ry. Co.*, 374 U.S. 1, 5 (1963) (noting that en banc vote-counting procedure at issue was "clearly within the scope of the court's discretion" and that for "th[e] Court to hold otherwise would involve it unnecessarily in the internal administration of the Courts of Appeals").

Since *Shenker* was decided, however, much has

changed. First, in 1967, this Court adopted the Federal Rules of Appellate Procedure in order to achieve uniformity of procedure across the federal appellate system. *See* 16A Charles Alan Wright et al., Federal Practice & Procedure § 3945, at 10 (3d ed. 1999) ("Th[e] hodgepodge of nonuniform and outdated rules created a situation ripe for procedural reform in the interest of an effective and uniform administration of federal appellate justice."). By including Rule 35(a) among these rules, this Court recognized that en banc procedure is important enough to warrant uniform application throughout the circuits. Second, the en banc vote-counting practices of the various courts of appeals have shifted. From the time of *Shenker* until the early 1980s, "most Courts of Appeals followed the same in banc vote-counting rule," *Lewis* v. *University of Pittsburgh*, 725 F.2d 910, 930 (3d Cir. 1983) (Statement Sur Petition for Rehearing), namely, the absolute-majority rule currently followed by the First Circuit. Since the 1980s, however, a growing number of circuits have chosen to grant en banc review based upon the decision of a majority of the non-recused judges.[9] *Id.* This growing split among the circuits has "create[d] the appearance of rights determined by happenstance." *Id.* To the extent that *Shenker* countenances the First Circuit's current practice, this Court should reexamine that decision in light of the increased need for national uniformity regarding the counting of votes on petitions for rehearing en banc.

This case provides a glaring example of the problems with the absolute-majority rule followed by the First Circuit. En banc procedures are meant to ensure

[9] This shift may well be due in part to the fact that at the time *Shenker* was decided, Congress had not yet imposed the strict financial disqualification rules now codified at 28 U.S.C. §§ 455(b)(4) and (d)(4). As a result, recusals were far less common than they are today. See *Lewis*, 725 F.2d at 930 n.6.

intra-circuit uniformity of decisions. In fact, the primary justification for the absolute-majority rule is that, otherwise, settled precedent could be overturned by less than a majority of the full court. See *Lewis*, 725 F.2d at 929. In this case, however, it is precisely the absolute-majority rule that has allowed three judges (only two of whom were in regular active service) to overturn settled First Circuit law. As Chief Judge Torruella noted in his dissent from the denial of rehearing en banc, "it is difficult to conclude that the panel opinion in [this case] is anything but a reversal of the panel opinion in *Whitehouse* v. *United States District Court*, 53 F.3d 1349 (1st Cir. 1995)." Pet. App. at A54. Yet, because the absolute-majority rule treats a recusal as the equivalent of a "no" vote, the two active members of the panel were able to thwart an attempt by the rest of the First Circuit to rehear the case. Thus, the absolute-majority rule has had the perverse effect in this case of insulating from review a panel decision that overturns settled circuit precedent.

The current split among the circuits regarding rehearing en banc subverts the purpose of the Federal Rules of Appellate Procedure and makes the important mechanism of en banc review too rare an occurrence.[10] By granting the writ, this Court can ensure that the goal of a nationally uniform voting procedure for rehearing en banc will be achieved.

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[10] The absolute-majority rule affects all of the circuits in which it is employed, not just the six-member First Circuit. The rule will make a dispositive difference whenever there is a recused judge and the vote on en banc rehearing is very close (i.e., a margin of only one or two votes). Thus, the cases in which the absolute-majority rule is most likely to make a difference are those that, by definition, are important and difficult enough to result in a close vote.

CONCLUSION

For the foregoing reasons, the Judges' petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: September 20, 2000

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civ. No. 98-cv-10896-B

DONALD K. STERN, IN HIS OFFICIAL CAPACITY AS UNITED STATES ATTORNEY FOR THE DISTRICT OF MASSACHUSETTS, ET AL., PLAINTIFFS,

V.

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS, ET AL., DEFENDANTS.

ORDER AND MEMORANDUM OF DECISION

BRODY, *District Judge*

In this action for declaratory and injunctive relief, Plaintiff Donald K. Stern, United States Attorney for the District of Massachusetts, seeks to prevent enforcement of Rule 3.8(f) of the Massachusetts Rules of Professional Conduct ("Rule 3.8(f)" or "the Rule").[1] Defendants are the United States District Court for the District of Massachusetts ("District Court"), the United States District Court Judges for the District of Massachusetts ("District Court Judges"), and Arnold R. Rosenfeld, Bar Counsel for the Board of Bar Overseers ("Rosenfeld").[2] Currently before the Court are Plaintiff's Motion for Preliminary Injunction and Defendants District Court and District Court Judges' Motion to Dismiss for lack of ripeness. At an October

[1] By stipulation dated October 2, 1998, the parties dismissed Craig C. Donsanto, Director, Election Crimes Branch, Criminal Division, Department of Justice, as a plaintiff in the case.

[2] By stipulation dated October 2, 1998, the parties dismissed the Supreme Judicial Court of Massachusetts and the Massachusetts Board of Bar Overseers as defendants in the case.

6, 1998 hearing on these motions, the parties agreed that resolution of Plaintiff's claims for permanent and declaratory relief also was appropriate at this time and that they be consolidated for disposition. For the reasons set forth below, Defendants' Motion to Dismiss is DENIED and Plaintiff's requests for preliminary and permanent injunction and declaratory judgment also are DENIED.

I. BACKGROUND

Rule 3.8(f) was promulgated by the Supreme Judicial Court of Massachusetts as an amendment to the Massachusetts Rules of Professional Conduct. The Rule governs the conduct of prosecutors who seek to subpoena a lawyer to testify about a client. It provides as follows:

> The prosecutor in a criminal case shall . . .
>
> (f) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless:
>
> 1) the prosecutor reasonably believes:
>
> (i) the information sought is not protected from disclosure by any applicable privilege;
>
> (ii) the evidence sought is essential to the successful completion of an on-going investigation or prose cution; and
>
> (iii) there is no other feasible alternative to obtain the information; and
>
> 2) the prosecutor obtains prior judicial approval after an opportunity for a prior adversarial proceeding.

Mass. R. Prof. Conduct 3.8(f).

The United States District Court for the District of Massachusetts adopted Rule 3.8(f) pursuant to Local Rule 83.6(4) of that court, which provides that the Massachusetts Rules of Professional Conduct govern the conduct of lawyers appearing before the United States District Court for the District of Massachusetts "except as otherwise provided by specific rule of this court after consideration of comments by representatives of bar associations within the Commonwealth." Local R. 83.6(4)(b) of the United States District Court for the District of Massachusetts. In a letter to the District Court dated November 17, 1998, Plaintiff Stern requested that it decline to adopt Rule 3.8(f). Chief Judge Tauro responded by letter stating that after extensive discussion of the issue among the District Judges, "the court declines at this time to modify Local Rule 83.6" so as to except Rule 3.8(f) from its reach. (Compl. ¶ 10.) He also noted that "to the degree that the issues discussed in your letter of November 17 may require resolution, the court anticipates that this will be done in particular cases or controversies appropriate for judicial determination." *Id.*

Rule 3.8(f) subsequently took effect in the Commonwealth of Massachusetts and in the United States District Court for the District of Massachusetts on January 1, 1998. It applies to all state and federal prosecutors who are members of the Bar of the Supreme Judicial Court of Massachusetts and to all federal prosecutors appearing before the United States District Court for the District of Massachusetts.[3]

[3] The Supreme Judicial Court and the Board of Bar Overseers monitor the compliance of their members with all Massachusetts Rules of Professional Conduct, including Rule 3.8(f). The United States District Court enforces Rule 3.8(f) with respect to attorneys appearing before it. In his affidavit, Defendant Rosenfeld

Prior to the adoption of Rule 3.8(f), service of subpoenas on lawyers by federal and state prosecutors in Massachusetts was governed by Supreme Judicial Court Rule 3.08, PF 15 ("Rule 3.08").[4] While former Rule 3.08 simply required prosecutors to seek judicial approval before subpoenaing lawyers to testify about their clients in front of a grand jury, Rule 3.8(f) additionally provides for the opportunity for an adversarial hearing and sets forth three criteria about which a prosecutor must have a reasonable belief. The First Circuit upheld former Rule 3.08 against a challenge by federal prosecutors much like the one raised here. *See United States* v. *Klubock*, 832 F.2d 664, 667-68 (lst Cir. 1987) (en banc) (evenly divided court).

Just as under prior practice pursuant to former Rule 3.08, federal prosecutors seeking to subpoena a lawyer regarding a client in a 3.8(f) regime are subject to guidelines promulgated by the Department of Justice. The guidelines provide that before approving such a

states that the Board of Bar Overseers would not institute disciplinary action pursuant to Rule 3.8(f) against federal prosecutors who are members of the Bar of the Supreme Judicial Court of Massachusetts practicing in a state or federal court outside the Commonwealth. (Rosenfeld Aff. ¶ 19.) As the party responsible for prosecuting violations of the Massachusetts Rules of Professional Conduct on behalf of the District Court, Defendant Rosenfeld further states that any disciplinary action pursuant to Rule 3.8(f) against a federal prosecutor in connection with a proceeding in the United States District Court for the District of Massachusetts will be initiated in federal court, not in state court or before the Board of Bar Overseers. (Rosenfeld Aff. ¶ 8.)

[4] Rule 3.08 provided that:

> It is unprofessional conduct for a prosecutor to subpoena an attorney to a grand jury without prior judicial approval in circumstances where the prosecutor seeks to compel the attorney/witness to provide evidence concerning a person who is represented by the attorney/witness. *Klubock*, 832 F.2d at 649.

subpoena, the Assistant Attorney General for the Criminal Division must apply the following principles:

- The information sought shall not be protected by a valid claim of privilege.

- All reasonable attempts to obtain the information from alternative sources shall haveproved to be unsuccessful.

- In a criminal investigation or prosecution, there must be reasonable grounds to believe that a crime has been or is being committed, and that the information sought is reasonably needed for the successful completion of the investigation or prosecution. The subpoena must not be used to obtain peripheral or speculative information ....

- The need for the information must outweigh the potential adverse effects upon the attorney-client relationship. In particular, the need for the information must outweigh the risk that the attorney may be disqualified from repreesentation of the client as a result of having to testify against the client.

- The subpoena must be narrowly drawn and directed at material information regarding a limited subject matter and shall cover a reasonable, limited period of time.

United States Attorney's Manual § 9-13.410.

In support of his Motion for Preliminary Injunction, Plaintiff asserts that from November 1993 to September 1997, the United States Attorney for the

District of Massachusetts sought authorization from the Department of Justice to serve approximately 199 subpoenas on lawyers concerning their present or former clients. Plaintiff also represents that when Rule 3.8(f) took effect he ordered a moratorium on all subpoenas to lawyers pending the outcome of this action. At this time, Plaintiff states that his office has at least 26 subpoenas to lawyers awaiting issuance. (Stern Aff. ¶ 15.)

II. MOTION TO DISMISS

The District Court and the District Court Judges move this Court to dismiss Plaintiffts claim for lack of subject matter jurisdiction on the ground that it is unripe or, in the alternative, to decline to decide the case in an exercise of its discretion under the Declaratory Judgment Act, 28 U.S.C. § 2201-2202 (1994). The Court finds Defendants' arguments sound, and acknowledges that under some circumstances, they might be dispositive. Nevertheless, the Court is convinced that this controversy is amenable to resolution as currently configured and that resolution is desirable at this time as a matter of practical necessity and in the interest of judicial economy.

The issue for decision in this case is whether the District Court has the power to adopt Rule 3.8(f). As evidenced by the discussion of the merits set forth below, this is primarily a legal question resolution of which would not be aided by further factual development. *See State of Rhode Island* v. *Narragansett Indian Tribe*, 19 F.3d 685, 693 (lst Cir. 1994) (finding case ripe, in part, because statutory interpretation is purely legal issue). Moreover, the issue has been well briefed and argued by the parties. Dismissal at this stage would lead to redundant and piecemeal proceed-

ings throughout the District of Massachusetts. Finally, and in the Court's view most importantly, this matter has been pending before the courts for over seven months. During that time, Plaintiff's self-imposed moratorium on subpoenas to lawyers has delayed the service of over 26 subpoenas and presumably compromised multiple grand jury investigations. The Court is persuaded that prompt resolution of the issue is warranted in the interest of all concerned. Recent passage of 28 U.S.C. § 503B only strengthens the Court's position that its decision is both timely and correct.[5] The

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[5] During the pendency of this action, the President signed into law H.R. 4276 § 811, to be codified at 28 U.S.C. § 503B ("Section 503B"). The statute, which is scheduled to take effect on April 19, 1999, provides as follows:

> An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in the State.

28 U.S.C. § 503B(a).

While Section 503B does not definitively settle the issue presented in this case, as Defendants claim, it nevertheless is relevant. Assuming Section 503B becomes effective, which Plaintiff argues is far from certain, Rule 3.8(f) would apply to federal prosecutors appearing in federal court in the Commonwealth of Massachusetts as a state ethical rule regardless of whether the District Court had ever adopted it. Presumably, however, the application of the Rule by the state still would be subject to challenge on Supremacy Clause grounds if it conflicted with the Constitution or the Federal Rules of Criminal Procedure. Similarly, as Plaintiff points out, Section 503B cannot empower district courts to adopt rules governing the behavior of attorneys that squarely conflict with the Constitution or federal law. If Rule 3.8(f) is inconsistent with the Federal Rules of Criminal Procedure or federal common law governing a district court's power to regulate the grand jury, as Plaintiff alleges, it cannot legitimately be adopted by the District Court. Thus, neither the recent adoption of Section 503B nor its future application eliminate the need for a court to resolve the issues presented in this case. On the other hand, once a court has concluded that Rule 3.8(f) is consistent with the Rules of Criminal Procedure and

Court therefore exercises its discretion to decide this case. *See Wilton* v. *Seven Falls Co.*, 515 U.S. 277, 286 (1995) ("the Declaratory Judgment Act has been understood to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants"). Defendants' Motion to Dismiss is denied.

III. INJUNCTIVE AND DECLARATORY RELIEF

Plaintiff seeks a preliminary and permanent injunction against enforcement of Rule 3.8(f), as well as declaratory relief. To merit a preliminary injunction, a movant must establish four criteria: (1) that irreparable harm will result to the movant if the injunction is not granted; (2) that the harm to the movant from a denial of an injunction outweighs the harm to the defendant caused by a grant of injunction; (3) that the movant is likely to succeed on the merits; and (4) that a grant of injunction would not adversely affect the public interest. *See AFL-CIO Laundry & Dry Cleaning Int'l Union* v. *AFL-CIO Laundry*, 70 F.3d 717, 718 (lst Cir. 1995). "Where, as here, the action has been consolidated—allowing the parties a full opportunity to present the merits of their cases—and permanent injunctive relief is involved, the standard of review is essentially the same except that the movant must show actual success on the merits rather than a mere likelihood." *K-Mart Corp.* v. *Davis*, 756 F. Supp. 62, 66 (D. P.R. 1991) (citing *Amoco Prod. Co.* v. *Village of Gambell*, 480 U.S. 531, 546 n.12 (1987)). Likewise, a request for declaratory relief requires resolution on

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other rules governing the grand jury, the enactment of Section 503B leaves no doubt that Congress intended to give district courts the power to adopt it.

the merits. Thus, the Court now turns to the merits of the case.[6]

As mentioned above, the Massachusetts Supreme Judicial Court and the United States District Court for the District of Massachusetts have required prosecutors to seek judicial approval before subpoenaing lawyers to testify about their clients in front of a grand jury since 1986 pursuant to Supreme Judicial Court Rule 3.08. Rule 3.8(f) differs from former Rule 3.08 in two relevant ways: first, it lists three specific criteria about which a prosecutor must have a reasonable belief before subpoenaing a lawyer; and second, it mandates the opportunity for an adversarial hearing. The issue in this case is whether the additional requirements of Rule 3.8(f) are within the District Court's rule-making power as delineated by the First Circuit in *Klubock* v. *United States*, 832 F.2d 664 (lst Cir. 1987) in which former Rule 3.08 was found to have been validly adopted, and *Whitehouse* v. *United States District Court for the District of Rhode Island*, 53 F.3d 1349 (lst Cir. 1995), a subsequent case upholding the adoption of a similar local rule by the District Court for the District of Rhode Island.

The power of a district court to enact rules derives from 28 U.S.C. § 2071(a),[7] Rule 57 of the Federal Rules

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[6] Since the Court concludes that Plaintiff is not entitled to prevail on the merits of his claim, it need not consider whether Plaintiff has satisfied the other requirements for injunctive relief, nor the issue raised by the parties concerning the appropriate standard for injunctive relief where the movant is a government entity.

[7] 28 U.S.C. § 2071(a) provides:

> The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.

28 U.S.C. § 2071(a)(1994).

of Criminal Procedure,[8] and "certain inherent rule-making powers arising from the nature of the judicial process." *Whitehouse*, 53 F.3d at 1355. A rule is presumptively valid unless:

> 1) the rule conflicts with an Act of Congress;
> 2) the rule conflicts with the Federal Rules of Criminal Procedure;
> 3) the rule is constitutionally infirm, or
> 4) the subject matter governed by the rule is not within the power of the district court to regulate.

Id. Plaintiff claims that Rule 3.8(f) conflicts with Rules 6(e), 17, and 57 of the Federal Rules of Criminal Procedure, as well as with federal common law governing a district court's supervisory power over the grand jury. Specifically, Plaintiff objects to three portions of the Rule: 1) the requirement of prior judicial approval; 2) the requirement of an adversarial hearing; and 3) the ethical requirements imposed on prosecutors. He argues that these features render Rule 3.8(f) beyond the District Court's rule-making power because they involve the district court substantively in the subpoena process and compromise the grand jury's secrecy and investigative functions.

Defendants respond that Plaintiff's claims are foreclosed by *Whitehouse*. In *Whitehouse*, the First Circuit considered a local rule adopted by the District Court for the District of Rhode Island ("Rhode Island rule").

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[8] Rule 57 of the Federal Rules of Criminal Procedure provides in relevant part:

> (a)(1) Each district court by action of a majority of the judges thereof may, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice. A local rule shall be consistent with — but not duplicative of — Acts of Congress and rules adopted under 28 U.S.C. § 2072.

Fed. R. Crim. P. 57.

The Rhode Island rule is similar to Rule 3.8(f) except that its substantive criteria and requirement of an opportunity for an adversarial hearing are contained in a comment to the rule, rather than its text.[9] In upholding the Rhode Island rule, the Court found that the rule was not inconsistent with Rules 17 and 57 of the Federal Rules of Criminal Procedure. *See id.* at 1362-65. The Court also found that the rule did not constitute an invasion of the province of the grand jury by the district court because it regulated the conduct of lawyers, not that of grand juries, and concluded that the district court had the power, whether statutory or inherent, to enact a "prophylactic rule[] to regulate perceived abuse by attorneys." *Id.* at 1356.

Crucial to the First Circuit's conclusion in *Whitehouse* was the Court's observation that the Rhode Island rule's requirements that the information be "essential" and that there be no "feasible alternative" to obtain it were contained in a non-binding comment. *See id.* at 1357 n.12. Indeed, the Court strongly suggested that had these requirements been binding, the rule would have worked a change in the substantive law concerning grand juries by extending the showing required to obtain prior judicial approval for a subpoena beyond the showing required for a successful motion to quash.[10] *See id.* at 1358 n.12. The

[9] The text of the Rhode Island rule upheld by the First Circuit provides:

> The prosecutor in a criminal case shall:
> (f) not, without prior judicial approval, subpoena a lawyer for the purpose of compelling the lawyer to provide evidence concerning a person who is or was represented by the lawyer when such evidence was obtained as a result of the attorney-client relationship.

Whitehouse, 53 F.3d at 1353.

[10] A subpoena will be quashed if (1) the material sought is privileged or (2) compliance would be unreasonable or oppressive. *See id.*, 53 F.3d at 1357 (citing *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972)).

Court affirmed the district court's authority to adopt the rule as written, however, because "in effect [it] merely change[d] the timing with respect to motions to quash." *Id.* at 1358.

Plaintiff maintains that the textual differences between Rule 3.8(f) and the Rhode Island rule distinguish this case from *Whitehouse*. This contention is based, in large part, on Plaintiff's interpretation of Rule 3.8(f) as mandating that a prosecutor demonstrate the criteria specified in Rule 3.8(f)(1)(i-iii) in order to obtain judicial approval of a subpoena. According to Plaintiff, the imposition of the requirements that a prosecutor demonstrate that the information sought is "essential" and that "there is no other feasible alternative to obtain the information" exceeds the district Court's rule-making authority because such a showing goes far beyond matters considered in the context of a motion to quash. Furthermore, Plaintiff's reading of Rule 3.8(f) as requiring that this showing be made at an adversarial hearing prompts Plaintiff to argue that the Rule compromises grand jury secrecy to a far greater extent than previous practice pursuant to former Rule 3.08.

Defendants do not seriously challenge Plaintiff's assertion that Rule 3.8(f) was invalidly adopted if Rule 3.8(f)(2) incorporates the requirements of Rule 3.8(f)(1). In fact, Defendant Rosenfeld conceded at oral argument that if the Rule is so interpreted, *Whitehouse* may well preclude its lawful adoption by the District Court. However, Defendants vigorously contest Plaintiff's reading of Rule 3.8(f). They argue that the criteria enumerated in Rule 3.8(f)(1) are independent of Rule 3.8(f)(2)'s requirement of prior judicial approval and an opportunity for an adversarial hearing, and that the existence of a prosecutor's reasonable belief as to those criteria merely constitutes permissi-

ble grounds for the District Court to initiate discipline against a prosecutor.[11] In Defendants' view, the nature of the inquiry for prior judicial approval is therefore no different from that which occurred under former Rule 3.08 and no more burdensome on a grand jury than the process triggered by a motion to quash. Thus, Defendants argue, the District Court's power to adopt rule 3.8(f) is clearly established by *Klubock* and *Whitehouse*.

In order to resolve this controversy, the Court will examine each of the three aspects of Rule 3.8(f)—its requirement of prior judicial approval, its mandate of an opportunity for an adversarial hearing, and its ethical standards—which Plaintiff claims render it beyond the District Court's power to adopt. However, since analysis of each of these requirements depends to some extent on whether, as Plaintiff argues, Rule 3.8(f)(2) incorporates the criteria of Rule 3.8(f)(1), it is first necessary for the Court to construe the Rule.

The Court finds that Rule 3.8(f) does not require that a prosecutor demonstrate the criteria enumerated in 3.8(f)(1) to secure the judicial approval of an attorney subpoena required by 3.8(f)(2).[12] This reading of the Rule is based on several considerations. First, careful examination of the plain language of Rule 3.8(f) indicates that Rule 3.8(f)(2) does not incorporate the criteria of 3.8(f)(1): the criteria are required objects

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[11] Defendant Rosenfeld avers that this is his interpretation of Rule 3.8(f). (Rosenfeld Aff. ¶ 10.)

The District Court and the District Court Judges take the position that this interpretation of Rule 3.8(f) is an entirely reasonable alternative to the one put forth by Plaintiff. They note, however, that they refrain from arguing in favor of any particular interpretation to avoid rendering an advisory opinion.

[12] The Court notes, however, that as a practical matter, a court faced with a request for an attorney-subpoena is likely to engage in a similar inquiry in the course of determining whether issuance of the subpoena is appropriate.

of a prosecutor's reasonable belief, not the basis for judicial approval. That this interpretation of the text of Rule 3.8(f) is correct becomes more clear when contrasted with the text of the comment to the Rhode Island rule which states in relevant part:

> The committee believes that a court called upon for judicial approval should be guided by appropriate standards. Accordingly, prior judicial approval should be withheld unless (1) the information sought is not protected from disclosure by an applicable privilege, (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution and is not merely peripheral, cumulative, or speculative . . . (5) the prosecutor has unsuccessfully made all reasonable attempts to obtain the information sought from non-attorney sources and there is no feasible alternative to obtain the information.

Whitehouse, 53 F.3d at 1366 app. A (emphasis added) (internal citation omitted). Second, Plaintiff presents no reasons why Rule 3.8(f) should be interpreted otherwise and absolutely no evidence, beyond bare assertion, that it will be.

To the extent that Plaintiff's requests for declaratory and injunctive relief are premised on the *possibility* that other courts will interpret Rule 3.8(f) differently when presented with an attorney-subpoena, the Court finds that such speculation has no impact on the issue for decision in this case, that is, whether the District Court had authority to adopt Rule 3.8(f). The Rule as written need not be construed to conflict with other statutes nor to exceed the District Court's rule-making power, and there is no reason to suppose that it would be so construed. *See id.* at 1358 n. 12. Furthermore, in the event that the parties or other courts do not find this Court's reasoning regarding the construction of

the Rule persuasive, such conflicts appropriately may be resolved at the Circuit level.

Before examining each of the three requirements of Rule 3.8(f) to which Plaintiff objects, the Court will address two opinions from other jurisdictions, *Baylson* v. *Disciplinary Bd. of the Supreme Court of Pa.*, 975 F.2d 102 (3rd Cir. 1992) and *United States* v. *Colorado Supreme Court*, 988 F. Supp. 1368 (D. Colo. 1998), which Plaintiff cites throughout his brief in support of his position that the Rule was invalidly adopted. In *Baylson*, the Third Circuit invalidated the adoption by the District Court for the District of Pennsylvania of a state disciplinary rule virtually identical to the Rhode Island rule which the First Circuit found validly adopted three years later in *Whitehouse*. *See Baylson*, 975 F.2d at 104. The Court in *Whitehouse* noted that *Baylson* did not address the question of whether the local rule was beyond the district court's power to adopt and explicitly rejected the *Baylson* court's finding that the local rule conflicted with the Federal Rules of Criminal Procedure. *See Whitehouse*, 53 F.3d at 1356, 1362-1365. For these reasons, this Court finds Plaintiff's reliance on *Baylson* misplaced.

In *Colorado Supreme Court*, the district court considered a disciplinary rule ("Colorado rule") which forbade a prosecutor from subpoenaing a lawyer to a grand jury to testify about a client unless the prosecutor reasonably believed that the information sought was (i) not privileged, (ii) essential to the successful completion of an ongoing investigation, and (iii) unobtainable by any feasible alternative means. *See Colorado Supreme Court*, 988 F. Supp. at 1370. Federal prosecutors sought injunctive and declaratory relief from application of the rule to them by the Disciplinary Board of the State Supreme Court. *See id.* at 1369. The district court held that the rule placed

impermissible restraints on the grand jury rendering it inconsistent with federal law, and that its application by the state to federal prosecutors therefore violated the Supremacy Clause. *See id.*

The Court is unpersuaded by *Colorado Supreme Court* for several reasons. First, the case is readily distinguishable from the one at bar because in that case the district court did not have occasion to consider whether a federal district court had the authority to adopt the rule since the prosecutors brought suit only against the state court. Second, despite the textual symmetry between the Colorado rule and Rule 3.8(f)(1), the Court does not agree that such rules impermissibly restrain the grand jury. Rule 3.8(f)(1), which the Court has concluded is not incorporated into Rule 3.8(f)(2), does not affect the grand jury; rather, it is merely an ethical rule governing prosecutors. As such, it is well within a federal district court's power to adopt. *See Whitehouse*, 53 F.3d at 1356, 1364.

The Court now resolves Plaintiff's objections to Rule 3.8(f)'s requirements of prior judicial approval and an opportunity for an adversarial hearing, and to the Rule's ethical proscriptions.

1. Prior judicial approval

The Court's finding that Rule 3.8(f)(2) does not incorporate the criteria of 3.8(f)(1) makes clear that Rule 3.8(f)'s requirement of prior judicial approval is no different from the requirement of prior judicial approval contained in former Rule 3.08 which was upheld in *Whitehouse*. *See id.* at 1357-58. Thus, the Court holds, as it must under binding precedent, that the District Court's adoption of Rule 3.8(f)(2)'s requirement of prior judicial approval is a valid act of its rulemaking authority.

2. Adversarial Hearing

Given the Court's interpretation of Rule 3.8(f),

Plaintiff's argument that the Rule's requirement of the opportunity for an adversarial hearing renders adoption of the Rule invalid is not persuasive. Since a prosecutor is not required to demonstrate that the information sought is "essential," nor that there is "no feasible alternative source for the information," the substance of the disclosure at an adversarial hearing pursuant to Rule 3.8(f) is no greater than the disclosure required to survive a motion to quash. The same degree and timing of disclosure already has been upheld by the First Circuit in *Whitehouse*. *See id.* at 1358 (finding former Rule 3.08 "merely change[d] the timing with respect to motions to quash"). Moreover, nothing in Rule 3.8(f) prevents a court, in the exercise of its discretion, from holding the adversarial hearing *in camera* to protect material from public disclosure as regularly is done in the context of motions to quash.[13] *See id.*

Plaintiff maintains, however, that disclosure of grand jury material even to the target of the subpoena and to counsel, threatens the secrecy and investigative function of the grand jury. He argues that Rule 3.8(f)'s requirement of an opportunity for an adversarial hearing will result in such disclosure and thus can be distinguished as more violative of grand jury secrecy than former Rule 3.08 under which application for prior judicial approval was made *ex parte* and under seal.

Plaintiff's concern is unfounded. The Court observes that if disclosure would be detrimental in a specific case, Rule 3.8(f) does not preclude a court from receiving *ex parte* submissions as occurs with regard to motions to quash. *See, e.g., In re Grand Jury Proceedings (Hill)*, 786 F.2d 3, 7-8 (1st Cir. 1986)

[13] The Court notes that an *in camera* hearing likely would be necessary in every instance in order to preserve grand jury secrecy. Judge Woodlock concurs. (Woodlock Aff. ¶ 16.)

(upholding submission of *ex parte* affidavits by government in opposition to motion to quash); *In re Grand Jury Subpoena (Legal Services Center)*, 615 F. Supp. 958, 966 (D. Mass. 1985) (same); *In re Grand Jury*, 103 F.3d 1140, 1145 (3rd Cir.) (same), *cert. denied*, 117 S. Ct. 2412 (1997); *see also* Woodlock Aff. ¶¶ 14-16. For this reason, the requirement of an opportunity for an adversarial hearing presents no more risk of disclosure than did former practice under Rule 3.08 or present practice on a motion to quash, nor does the requirement conflict with Rule 6(e)(5-6) of the Federal Rules of Criminal Procedure.[14]

Plaintiff additionally claims that an opportunity for an adversarial hearing will cause delays that will interfere with grand jury investigations. The Court finds this argument without merit. First, as Defendants point out, nothing in the Rule prevents a grand jury from overcoming delay by exercising its own subpoena power. Second, Plaintiff presents no evidence that more attorneys will avail themselves of Rule 3.8(f)'s opportunity to avoid a subpoena than the small number who file motions to quash. Third, given that the substance of the two inquiries is the same, the Court finds it likely that any adversarial hearing which does occur will likely eliminate the need for a motion to quash. Thus, the opportunity for an adver-

[14] Rule 6(e)(5) provides:

> Closed Hearing. Subject to any right to an open hearing in contempt proceedings, the court shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury.

Fed. R. Crim. P. 6(e)(5).

Rule 6(e)(6) provides:

> Sealed Records. Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before the grand jury.

Fed. R. Crim. P. 6(e)(6).

sarial hearing prior to the issuance of a subpoena will cause no greater delay than a post-issuance motion to quash. Fourth, the Rule does not prevent adversarial hearings from being held on an expedited basis if necessary.[15] Finally, speculation regarding delay does not impact the question of whether the District Court has the power to adopt Rule 3.8(f). If, in fact, the application of the adversarial hearing requirement results in delays that threaten the grand jury process, Plaintiff may seek redress at that time.

3. Ethical Standards

At oral argument, Plaintiff for the first time appeared to challenge the District Court's adoption of the ethical criteria of Rule 3.8(f)(1). Plaintiff expressed concern that a prosecutor would be disciplined for a failure to present sufficient evidence to a judge that the subpoena sought concerned "essential" information and that there existed "no other feasible alternative to obtain the information."[16] Here too, however, the Court's interpretation of Rule 3.8(f) negates Plaintiff's concern because no such showing is required to obtain prior judicial approval of a subpoena.

Plaintiff nevertheless objects to the district court's imposition of these ethical requirements on prosecutors because the threat of discipline concerning a prosecutor's own alleged lack of a "reasonable belief" as to the criteria set forth in Rule 3.8(1) will chill prosecutors in the discharge of their responsibilities with respect to grand juries. In particular, Plaintiff anticipated that disgruntled targets of grand jury investiga-

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[15] Judge Woodlock states that Local Rule 40.4(a)(2) provides that motions related to grand jury investigations may receive prompt consideration. (Woodlock Aff. ¶ 17.)

[16] Defendant Rosenfeld states in his affidavit that he would not bring disciplinary action against prosecutors on this basis. (Rosenfeld Aff. ¶ 11.)

tions whose lawyers had been subpoenaed will instigate disciplinary action against prosecutors. In addition, Plaintiff argued that the ethical requirements of Rule 3.8(1) are unnecessary because the attorney-client relationship is adequately protected by the Department of Justice Guidelines for attorney-subpoenas.

The Court acknowledges that Rule 3.8(f) subjects federal prosecutors to discipline for lack of a reasonable belief concerning the criteria listed in Rule 3.8(f)(1). Rule 3.8(f) is an ethical rule. As the Court has noted elsewhere in this opinion, however, the First Circuit has made clear that a district court has the power to adopt ethical rules governing attorneys so long as they do not violate the Constitution or statute. *See Whitehouse*, 53 F.3d at 1356, 1364. Neither Plaintiff's opinion concerning the wisdom and necessity of Rule 3.8(f) nor his speculation regarding its consequences are grounds for invalidating its adoption. Moreover, the enactment of 28 U.S.C. § 503B signals Congress's belief that the Department of Justice guidelines are insufficient and its desire that the states and the federal courts play a greater role in governing the conduct of government attorneys.

Because the Court finds that Plaintiff does not succeed on the merits of his claim, his requests for injunctive and declaratory relief are denied.

IV. CONCLUSION

For the reasons stated above, Defendants' Motion to Dismiss is DENIED and Plaintiff's requests for a preliminary and permanent injunction and declaratory judgment are also DENIED.

SO ORDERED.

s/ MORTON A. BRODY
MORTON A. BRODY
United States District Judge

Dated this 20th day of January, 1999.

United States Court of Appeals
For the First Circuit

No. 99-1839

DONALD K. STERN,
Plaintiff, Appellant,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, ET AL.,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[HON. MORTON A. BRODY,* *U.S. District Judge*]

Before

SELYA, *Circuit Judge*, COFFIN, *Senior Circuit Judge*, and BOUDIN, *Circuit Judge*.

Donald K. Stern, United States Attorney, with whom *David S. Mackey* and *Roberta T. Brown*, Assistant United States Attorneys, were on brief, for appellant.

Gael Mahony, with whom *E. Randolph Tucker, Michael D. Vhay, Matthew S. Axelrod*, and *Hill & Barlow* were on brief, for the federal appellees.

David Rossman for appellee *Daniel C. Crane*, (Massachusetts Bar Counsel).

Charles W. Rankin, *Rankin & Sultan*, and *Martin W. Healy* on brief for Massachusetts Bar Association, Boston Bar Association, and Massachusetts Association of Criminal Defense Lawyers, *amici curiae*.

April 12, 2000

* Of the District of Maine, sitting by designation.

SELYA, *Circuit Judge*. This appeal tests the limits of a federal district court's authority to promulgate local rules. The court below upheld a rule constraining the issuance of subpoenas seeking client-related information from lawyers in criminal cases. Because we find that the rule falls outside the permissible scope of local rulemaking authority, we reverse.

I. BACKGROUND

Before assaying a preliminary question of justiciability and addressing the controversy's merits, we trace the origins of the challenged rule and chart the travel of the case.

A. The Evolution of Local Rule 3.8(f).

The 1980s witnessed a dramatic increase in the number of subpoenas served on defense attorneys by federal prosecutors. The reasons for this trend are difficult to pinpoint, but some commentators have linked it with heightened efforts to fight organized crime and drug-trafficking, new forfeiture laws, and an unprecedented expansion of the Department of Justice (DOJ). *See* 1 Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* § 3.8:701, at 700 (Supp. 1996); Frank O. Bowman, III, *A Bludgeon by Any Other Name*, 9 Geo. J. Legal Ethics 665, 686 n.74 (1996). In 1985, mindful that forcing a lawyer to offer evidence against her client may sow seeds of mistrust and increase the incidence of conflicted interests, the DOJ introduced guidelines for the issuance of attorney subpoenas, including an internal preapproval process. See *United States* v. *Perry*, 847 F.2d 1346, 1347-48 (9th Cir. 1988) (citing United States Attorneys' Manual § 9-2.161(a) (July 18, 1985)). Responding to the prodding

of bar leaders, the Massachusetts Supreme Judicial Court (the SJC) also took prophylactic action. It adopted an ethics rule, known as Prosecutorial Function 15 (PF 15), which stated that:

> It is unprofessional conduct for a prosecutor to subpoena an attorney to a grand jury without prior judicial approval in circumstances where the prosecutor seeks to compel the attorney/witness to provide evidence concerning a person who is represented by the attorney/witness.

S.J.C. R. 3:07, PF 15 (effective Jan. 1, 1986).

The United States District Court for the District of Massachusetts thereafter incorporated PF 15 into its local rules. PF 15 withstood the United States Attorney's ensuing challenge by the narrowest of margins. *See United States* v. *Klubock*, 639 F. Supp. 117 (D. Mass. 1986), *aff'd*, 832 F.2d 664 (lst Cir. 1987) (equally divided en banc). Crucial to the district court's holding was the fact that PF 15 imposed no substantive limitations on the right to issue subpoenas. *See id.* at 120 & n.7, 124.

For the next twelve years, PF 15 held sway in the District of Massachusetts. In the interim, the Rhode Island Supreme Court adopted a rule of conduct requiring prosecutors to obtain judicial approval prior to issuing attorney subpoenas. *See* R.I. Sup. Ct. Rules, Art. V., R. Prof'l Conduct 3.8 & cmt. (adopted Nov. 1, 1988). This rule closely resembled PF 15, with two significant deviations: its reach extended to subpoenas outside the grand jury context, and its text included a comment outlining substantive standards to be applied by a court in determining whether to sanction an attorney subpoena request. *See id.* Specifically, the comment suggested that judicial approbation should be withheld unless, inter alia, the information sought

was (a) not privileged, (b) "essential" to the government's investigation, and (c) unobtainable from any "other feasible alternative." *Id.* When the United States District Court for the District of Rhode Island incorporated the state standard into its local rules on April 20, 1989, the United States Attorney for that district challenged it. In *Whitehouse* v. *United States District Court*, 53 F.3d 1349 (lst Cir. 1995), a panel of this court upheld the local rule, albeit strongly suggesting that a different result would obtain were the criteria limned in the comment embedded in the text of the rule itself (and, thus, made mandatory rather than precatory). *See id.* at 1357-58 & n.12.

We temporarily shift our focus to the national stage. In 1990, the American Bar Association (the ABA) amended Rule 3.8 of the Model Rules of Professional Conduct by adding a new paragraph (f) and comment:

> The prosecutor in a criminal case shall:
>
> ...
>
> (f) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless:
>
> (1) the prosecutor reasonably believes:
>
> (i) the information sought is not protected from disclosure by any applicable privilege;
>
> (ii) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; [and]
>
> (iii) there is no other feasible alternative to obtain the information; and
>
> (2) the prosecutor obtains prior judicial approval after an opportunity for an adversarial proceeding.

Comment

> Paragraph (f) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship. The prosecutor is required to obtain court approval for the issuance of the subpoena after an opportunity for an adversarial hearing is afforded in order to assure an independent determination that the applicable standards are met.

ABA Standing Comm. on Ethics and Prof'l Responsibility and Section of Criminal Justice, Report 118, at 1 (Feb. 1990). After the Third Circuit struck down a bar rule patterned on Model Rule 3.8(f), *see Baylson* v. *Disciplinary Bd.*, 975 F.2d 102 (3d Cir. 1992), the ABA retreated; it removed the judicial preapproval requirement by deleting both subparagraph (2) and the second sentence of the comment. *See* ABA Standing Comm. on Ethics and Prof'l Responsibility, Report 101, at 1 (Aug. 1995).

On June 9, 1997, the SJC amended the Massachusetts Code of Professional Conduct to replace PF 15 with the (discarded) 1990 version of Model Rule 3.8(f), omitting the second sentence of the comment, but including the rescinded subparagraph (2). *See* S.J.C. R. 3:07, Rule 3.8(f) & cmt. 4. The result was to alter PF 15 in three important respects: extending it to trial as well as grand jury subpoenas; providing for an "adversarial proceeding" in advance of the issuance of an attorney subpoena; and promulgating three substantive standards for judicial preapproval.

B. The Instant Litigation.

By local rule, attorneys practicing in the United States District Court for the District of Massachusetts must adhere to the ethical rules adopted by the SJC, unless a specific exception obtains. *See* D. Mass. R. 83.6(4)(B). On November 17, 1997, the United States Attorney for the District of Massachusetts, Donald K. Stern, wrote to the chief judge of the district court, urging that such an exception be made for State Rule 3.8(f). By letter dated December 3, 1997, the court declined to craft a specific exception, indicating that Stern's concerns would be resolved on a case-by-case basis. On January 1, 1998, Rule 3.8(f) went into effect. At that point, Stern directed his staff to hold in abeyance any applications to the district court for attorney subpoenas.

Stern and Craig C. Donsanto (a senior DOJ lawyer based in Washington and a member of the Massachusetts bar), both acting in their official capacities, filed suit in the district court on May 13, 1998. They sought to have both State Rule 3.8(f) and Local Rule 3.8(f) declared invalid as applied to members of the Massachusetts bar practicing before federal courts. The complaint alleged in substance that Rule 3.8(f), in both its federal and state incarnations, exceeded the district court's rulemaking authority, contradicted the federal common law anent grand jury practice, conflicted with the federal rules of criminal procedure and evidence, and violated the Supremacy Clause of the United States Constitution.

Initially, the named defendants were the SJC, the Massachusetts Board of Bar Overseers (the Board), Bar Counsel, and the United States District Court

itself.[1] The complaint was later amended to add as defendants the individual judges of the district court (hereinafter, along with the court itself, the Judicial Defendants).

The contours of the case were narrowed when Bar Counsel filed an affidavit in which he vouchsafed that he would not wield State Rule 3.8(f) against federal prosecutors, but, rather, would refer any alleged violations to the federal district court for discipline under Local Rule 3.8(f). This concession rendered the Supremacy Clause issue moot and led the plaintiffs to dismiss their claims against the SJC and the Board. Rosenfeld then agreed not to attempt to enforce Local Rule 3.8(f) against members of the Massachusetts bar practicing outside the commonwealth, and Donsanto dropped out of the picture.

Stern had moved at the outset for preliminary injunctive relief. All the defendants opposed this motion, and the Judicial Defendants filed a motion to dismiss the complaint as unripe. The district court heard argument on October 7, 1998, and took both motions under advisement. While the court was pondering the matter, the President signed into law a bill, now codified at 28 U.S.C. § 530B, that made certain state standards directly applicable to federal prosecutors. The parties debated the relevance and effect of this provision in a series of subsequent submissions.

The district court ultimately determined the issues presented to be ripe for review and rejected the claim that section 530B rendered the controversy moot. *See Stern* v. *SJC*, 184 F.R.D. 10, 13-14 & n.5 (D. Mass. 1999). Then, reading subparagraphs (1) and (2) independently, the court found *Whitehouse* controlling in

[1] The SJC administers professional responsibility matters through the Board. In turn, Bar Counsel, currently Daniel C. Crane, serves as the Board's chief enforcement officer. *See* S.J.C. R. 4:01.

part and upheld both the prior judicial approval requirement and the provision for an adversarial hearing. *See id.* at 17-19. Finally, the court approved the substantive requirements of subparagraph (1) as ethical precepts not inconsistent with federal law. *See id.* at 19. Following the entry of a final judgment, Stern launched this appeal.

II. RIPENESS

We consider de novo the Judicial Defendants' contention that the controversy is not ripe for adjudication. *See Riva* v. *Massachusetts*, 61 F.3d 1003, 1007 (lst Cir. 1995).

The ripeness doctrine has both constitutional and prudential dimensions. *See Public Serv. Comm'n* v. *Wycoff Co.*, 344 U.S. 237, 242-44 (1952); *Rhode Island Ass'n of Realtors* v. *Whitehouse*, 199 F.3d 26, 33 (lst Cir. 1999). Its basic rationale is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 148 (1967). Courts must apply a two-part test to assess ripeness. *See id.* at 149. First, it is necessary to determine whether the issue presented is fit for judicial review — an inquiry that "typically involves subsidiary queries concerning finality, definiteness, and the extent to which resolution of the challenge depends on facts that may not yet be sufficiently developed." *Ernst & Young* v. *Depositors Econ. Protection Corp.*, 45 F.3d 530, 535 (lst Cir. 1995). Second, it is necessary to evaluate the extent to which withholding judgment will impose hardship — an inquiry that typically "turns upon whether the challenged action creates a 'direct and immediate' dilemma for the parties." *W.R. Grace & Co.* v. *EPA*, 959 F.2d 360, 364 (lst Cir. 1992) (quoting

Abbott Labs., 387 U.S. at 152). Both prongs of the test ordinarily must be satisfied, although a very strong showing on one axis may compensate for a relatively weak showing on the other. *See Ernst & Young*, 45 F.3d at 535.

This case, which questions whether the federal district court has the power to incorporate State Rule 3.8(f) into the armamentarium of its local rules, passes the first prong of the test. The issue presented can be finally resolved by declaratory judgment, its contours are sharply defined, and additional facts will not affect its resolution. The conclusion that the issue is fit for review is bolstered, moreover, by a realization that deciding the question appears unavoidable: Local Rule 3.8(f) imposes new substantive and procedural requirements on prosecutors who request attorney subpoenas, and Bar Counsel has stated unequivocally that he will enforce those requirements. Since bringing this suit, the United States Attorney has delayed requests for no fewer than twenty-six such subpoenas, and it seems reasonable to suppose that in some of these instances the prosecutors would have had difficulty in satisfying the "essentiality" and/or "no feasible alternative" criteria. Short of a continuation of Stern's self-imposed moratorium — and the public has a right to expect that such a state of affairs will not last indefinitely — a test of Local Rule 3.8(f)'s facial validity appears inevitable.

This case also satisfies the hardship prong. Delaying adjudication until a more concrete controversy emerges (until, say, a particular attorney subpoena request reaches the judicial preapproval stage or disciplinary proceedings are instituted in the aftermath of a served subpoena) would inflict significant institutional costs with little corresponding gain. Indeed, charting such a course would put Stern on the horns of

a dilemma, forcing him to decide whether to serve attorney subpoenas in cases arguably prohibited by the local rule and thus risk potential sanctions or to refrain from so doing and thus jeopardize the success of ongoing criminal investigations. It is precisely this sort of " 'direct and immediate' dilemma," *W.R. Grace*, 959 F.2d at 364 (quoting *Abbott Labs.*, 387 U.S. at 152), that Congress wished to ameliorate when it passed the Declaratory Judgment Act. *See ANR Pipeline Co.* v. *Corporation Comm'n*, 860 F.2d 1571, 1578 (l0th Cir. 1988) ("Once the gun has been cocked and aimed and the finger is on the trigger, it is not necessary to wait until the bullet strikes to invoke the Declaratory Judgment Act.").

A determination that this case is ripe for adjudication squares with the way in which we, and other courts of appeals, have treated analogous cases (albeit without explicit discussion of ripeness). In *Klubock*, this court fielded a preemptive strike by federal prosecutors against a newly adopted ethics rule. In *Whitehouse*, we entertained a similar foray, explaining that "the proper method for mounting a facial challenge to the validity of [a local rule] . . . is through an action for declaratory and/or injunctive relief filed in the district court." 53 F.3d at 1353. Moreover, two other courts of appeals have adjudicated preenforcement challenges to ethics rules in parallel circumstances. *See United States* v. *Colorado Supreme Court*, 189 F.3d 1281 (l0th Cir. 1999) (*CSC II*); B*aylson*, 975 F.2d 102.

Another case that sheds light on the question of ripeness is *United States* v. *Colorado Supreme Court*, 37 F.3d 1161 (l0th Cir. 1996) (CSC I). There, the Tenth Circuit held that the United States had standing to mount a pre-enforcement challenge to a local rule identical to Local Rule 3.8(f), crediting the government's stated trepidation that the rule would interfere

with federal subpoena practice. *See id.* at 1165-67. Although the *CSC I* court did not discuss ripeness per se, standing and ripeness often overlap. *See Rhode Island Ass'n of Realtors*, 199 F.3d at 33. So here: we think that the court's finding of standing necessarily implied that the controversy was ripe for adjudication.

In a pre-enforcement challenge to a law carrying significant penalties, standing exists when the plaintiff has manifested an intention to engage in conduct arguably proscribed by the statute, and there exists a "credible threat" of enforcement. *New Hampshire Right to Life Political Action Comm.* v. *Gardner*, 99 F.3d 8, 14 (lst Cir. 1996). In most situations, as here, that self-same credible threat serves to render the case fit for judicial review and to demonstrate the hardship that will result should no review ensue. *See Rhode Island Ass'n of Realtors*, 199 F.3d at 33 (stating that a "concrete plan[] to engage immediately (or nearly so) in an arguably proscribed activity . . . gives a precise shape to disobedience, posing a specific legal question fit for judicial review," and " [a] showing that the challenged statute, fairly read, thwarts implementation of the plan adds the element of hardship").

The Judicial Defendants' vigorous arguments to the contrary are ultimately unpersuasive. Citing *Ernst & Young*, they asseverate that Stern's claims are too contingent and uncertain to be fit for review. But the examples they give include events that are almost certain to materialize (*e.g.*, internal DOJ approval of an application for a subpoena addressed to an attorney), and events that are completely irrelevant (*e.g.*, destruction of evidence by a targeted attorney). Stern stands poised to request and serve attorney subpoenas, but reasonably fears disciplinary proceedings (for himself and his staff) if he does so. Thus, the only contingency likely to deter the parties from a collision

course is continued self-restraint on the part of Stern's office. This is a far cry from *Ernst & Young*, where the relevant injury would materialize, if at all, only after a long chain of remote and speculative events, many of which involved third parties.[2] See 45 F.3d at 538.

Next, the Judicial Defendants note that the tilinchpin of ripeness . . . is adverseness." *Rhode Island* v. *Narragansett Indian Tribe,* 19 F.3d 685, 692 (lst Cir. 1994). Building on this foundation, they complain that the current controversy lacks adverseness because the lawyers potentially subject to subpoena (and their clients, for that matter) are unrepresented. This rather simplistic formulation overlooks, however, that as a general rule a "conflict between state officials empowered to enforce a law and private parties subject to prosecution of that law is a classic 'case' or 'controversy' within the meaning of Art. III." *Diamond* v. *Charles*, 476 U.S. 54, 64 (1986). The defendants here are empowered to enforce the strictures of Local Rule 3.8(f) through disciplinary proceedings against Stern and his subalterns. This type of controversy is thus sufficiently adverse even though the class of persons that the law was designed to protect is not separately represented. After all, that class "lacks a judicially cognizable interest in the prosecution or nonprosecution" of Stern or the other attorneys in his office. *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 619 (1973). Consequently, the fact that the district court adopted Local Rule 3.8(f) out of a desire to shield the attorney-client relationship does not mean that particular attorneys and clients must be joined in a facial attack on the rule.

Finally, the Judicial Defendants suggest that the

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[2] *Massachusetts Ass'n of Afro-American Police* v. *Boston Police Department*, 973 F.2d 18 (lst Cir. 1992) (per curiam), is similarly distinguishable. There, we found a pre-enforcement challenge unripe because the party with the power to inflict the feared injury had expressly disclaimed any intent to do so. See id. at 20-21.

DOJ guidelines render this case unripe. Because the standards contained in the guidelines and those contained in Local Rule 3.8(f) overlap, this thesis goes, there is scant likelihood that Local Rule 3.8(f) will work any harm. This thesis has a plausible ring but, in the last analysis, it fails to cover the ground. We explain briefly.

There is no question that the DOJ guidelines' "reasonably needed" criterion, 3 *Department of Justice Manual* § 9-13.410, at 9-165 (2d ed. 2000), is markedly less demanding than the "essentiality" requirement contained in Local Rule 3.8(f). We think that the DOJ criteria are also less demanding than the "no feasible alternative" requirement; the guidelines stipulate that "all reasonable attempts shall be made to obtain the information from alternative sources . . . *unless such efforts would compromise the investigation or case,*" *id.* (emphasis supplied), whereas the "no feasible alternative" provision contains no similar loophole. In all events, the guidelines are subject to change at the whim of the DOJ. Last (but not least), an internal review mechanism that specifically disavows any intent to create legally enforceable rights obviously does not burden prosecutors in the same way, or to the same extent, as does a binding rule of court that imposes substantive standards, requires prior judicial approval, and subjects government attorneys to potential disciplinary action. *Cf. Whitehouse*, 53 F.3d at 1362 n.18 (suggesting that DOJ guidelines did not render a prior judicial approval requirement superfluous). For these reasons, we reject the notion that the mere existence of the DOJ guidelines dissipates any hardship.

We have said enough on this score. The threat of ethics enforcement is genuine, compliance costs are real and immediate, and the chilling effect on attorney

subpoena requests constitutes an injury sufficient to support a justiciable controversy. *See CSC I*, 87 F.3d at 1165-67. Thus, the issue presented here — the authority of the federal district court to incorporate State Rule 3.8(f) into its local rules — is ripe for review.

III. THE MERITS

The authority of the federal district courts to adopt local rules emanates from three sources. First, Congress has empowered the Supreme Court to prescribe rules of practice and procedure for the federal courts. See 28 U.S.C. § 2072(a). In turn, the Supreme Court has authorized district courts to craft local rules to implement, or fill gaps in, national rules of practice and procedure. *See* Fed. R. Crim. P. 57(a)(1); Fed. R. Civ. P. 83(a)(1). Second, Congress has vested the lower federal courts with independent authority to prescribe local rules. *See* 28 U.S.C. § 2071(a). Third, district courts have inherent power arising from the nature of the judicial process, and this power extends to certain types of rulemaking. *See Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 43 (1991); *Whitehouse*, 53 F.3d at 1355.

Regardless of the source, local rulemaking authority is bounded. A local rule must be both constitutional and rational, and its subject matter must be within the ambit of the court's regulatory power. *See Frazier* v. *Heebe*, 482 U.S. 641, 646 (1987); *Whitehouse*, 53 F.3d at 1355-56. In this same vein, a local rule must be consistent with, but not duplicative of, Acts of Congress and nationally applicable rules of practice, procedure, and evidence. *See* 28 U.S.C. § 2071(a); Fed. R. Crim. P. 57(a)(1); Fed. R. Civ. P. 83(a)(1). Even if a local rule does not contravene the text of a national rule, the former cannot survive if it subverts the latter's purpose. *See Hawes* v. *Club Ecuestre el Comandante*, 535 F.2d

140, 144 (lst Cir. 1976). Then, too, local rules should cover only interstitial matters. *See* Fed. R. Crim. P. 57 advisory committee's note; *see also United States* v. *Horn*, 29 F.3d 754, 760 (lst Cir. 1994) (noting that a court's inherent power has definite limits). They may not create or affect substantive rights, *see* 28 U.S.C. § 2072(b), or institute "basic procedural innovations," *Miner* v. *Atlass*, 363 U.S. 641, 650 (1960).

The core issue presented by this appeal is whether the district court had the power to adopt Local Rule 3.8(f). This question of law engenders de novo review. Before answering this query, however, we pause to measure its dimensions.

A. How to construe Local Rule 3.8(f).

At Bar Counsel's urging, the court below read subparagraphs (1) and (2) of Local Rule 3.8(f) independently. *See Stern*, 184 F.R.D. at 16-17. On this bifurcated reading, the substantive standards delineated in subparagraph (1) would be relevant only to potential disciplinary proceedings, and a court deciding whether to approve a subpoena request pursuant to subparagraph (2) would have no obligation to apply them. We reject this artificial construction of Local Rule 3.8(f).

The most sensible way to construe Local Rule 3.8(f) is as a unified whole. Each subparagraph is a mere sentence fragment and neither makes sense without reference to the shared introductory language. Court rules, like statutes and ordinances, generally are to be read in a holistic manner. *See, e.g., Kinq v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991); *Massachusetts Ass'n of HMOs* v. *Ruthardt*, 194 F.3d 176, 180 (lst Cir. 1999); *O'Connell* v. *Shalala*, 79 F.3d 170, 176 (lst Cir. 1996). This tenet applies with special force when subdivisions are grammatically interrelated. *See American*

Standard, Inc. v. *Crane Co.*, 510 F.2d 1043, 1058 (2d Cir. 1974).

Here, the case for reading the rule as a whole is even stronger, for the connection between the two halves is not only grammatical but also logical. Subparagraph (2) outlines a process for determining whether a subpoena application should be approved, but gives no clue as to what standard a judge is to apply in making that determination. The obvious place to look is subparagraph (1), which sets forth such a standard. Indeed, the court below acknowledged that "as a practical matter, a court faced with a request for an attorney-subpoena is likely to engage in a similar inquiry in the course of determining whether issuance of the subpoena is appropriate." *Stern*, 184 F.R.D. at 16 n.12. The presence of the attorney to be subpoenaed — a feature not involved in the scheme upheld in *Whitehouse* — virtually guarantees such an inquiry.

On the other hand, subparagraph (2) would serve no purpose if courts evaluated subpoena applications solely on the basis of traditional motion-to-quash standards. For the adversarial hearing to be meaningful, the targeted attorney would have to be told in advance of the content of the testimony or materials sought. This notice, no less than service of the subpoena itself, would drive a wedge of distrust between lawyer and client. Thus, subparagraph (2), on the bifurcated reading, would mirror existing quashal procedure and generate no ethics benefits whatsoever.

The sockdolager is that the original drafters certainly intended that the two subparagraphs of the rule be harmonized, not balkanized. As discussed above, the text of Local Rule 3.8(f) derives from (and is identical to) a former ABA Model Rule. The comment to that rule made it transparently clear that the judicial preapproval described in subparagraph (2) was

designed to ensure compliance with the substantive standards described in subparagraph (1). Absent some specific disclaimer (not present here), the district court cannot adopt verbatim the text of a model rule without accepting the drafters' unequivocal interpretation of its meaning. Cf. Felix Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Colum. L. Rev. 527, 537 (1947) ("[I]f a word is obviously transplanted from another legal source . . . it brings the old soil with it.").

To be sure, when the SJC formulated State Rule 3.8(f), it omitted the second sentence of the comment to the former ABA rule (which made the connection between the two subparagraphs explicit). *But see Whitehouse*, 53 F.3d at 1358 nn.12 & 14, 1364-65 (noting that comments and commentary are not binding). In addition, the Massachusetts version lists as the sources for subparagraph (2) both former ABA Model Rule 3.8(f) (2) and PF 15, and the latter rule has been interpreted to impose no substantive restrictions beyond the prototypical motion-to-quash standards. *See Klubock*, 639 F. Supp. at 120 & n.7, 124. But these reeds are far too slender to shore up a construction that splits grammatically interrelated provisions, imports a standard of review from outside the ethics code, and directly contradicts the drafters' manifest intention.

Bar Counsel also argues that we should defer to his construction because he is the official charged with enforcement of ethics rules in Massachusetts. With respect, we doubt that Bar Counsel's litigation position is entitled to any deference. *Cf. Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (holding that an agency's litigating position is not entitled to deference); *Massachusetts* v. *Blackstone Valley Elec. Co.*, 67 F.3d 981, 991 (lst Cir. 1995) (same). In all events, Bar Counsel's construction does not bind the judges of the

District of Massachusetts who, as defendants here, have pointedly refused to endorse it.[3] Finally, any deference that might normally be due is overcome here by the availability of a much more logical reading and a clear statement of the drafters' intent. *Cf.* 12 Charles Alan Wright et al., *Federal Practice & Procedure* § 3153, at 533 (2d ed. 1997) (explaining that even "a district court's construction of its own rule will be reversed if the appellate court is convinced that the district court has misconstrued its own rule").

Bar Counsel next invokes the principle that courts should resist interpreting a statute in a way that provokes a constitutional problem. *See United States* v. *Gifford*, 17 F.3d 462, 473 (lst Cir. 1994). Other courts of appeals have extended this principle to the construction of local rules, thereby seeking to avoid interpretations that place local rules on a coilision course with national rules. *See, e.g., Marshall* v. *Gates*, 44 F.3d 722, 725 (9th Cir. 1995); *United States* v. *White*, 980 F.2d 836, 844 (2d Cir. 1992); *cf. Jaroma* v. *Massey*, 873 F.2d 17, 20 (lst Cir. 1989) (per curiam) (explaining that ambiguous "[l]ocal district court rules cannot be construed in such a way as to render them inconsistent with applicable provisions of the Federal Rules of Civil Procedure").

There are reasons to question whether such an extension of the principle is appropriate; after all, striking down a local rule, unlike declaring a statute unconstitutional, does not implicate separation of powers or countermajoritarian concerns. But even assuming, for argument's sake, the validity of the extended principle – on the ground, say, that the local rule here derives from a state rule, and that the issue therefore has overtones of comity – it does not control the out-

[3] Consistent with their position that the controversy is not ripe, the Judicial Defendants apparently deem it incumbent upon them to refrain from rendering what might be seen as an advisory . .

come in this instance. Interpretive ingenuity has its limits. The idea that judges charged with interpreting a rule should strive to do so in a way that will avoid conflicts with governing law is a useful device in doubtful cases, but it does not permit the interpreters to substitute their judgment for that of the drafters or to rewrite the rule from scratch. Here, there is both a natural, holistic reading of the local rule and a clear statement by the drafters in support of such a reading. In these circumstances, we will not embrace an implausible construction simply to minimize the potential for conflict with federal law.

For these reasons, we hold that Local Rule 3.8(f) must be read as an indivisible whole. Consequently, judicial preapproval under subparagraph (2) of the rule proceeds, if at all, on the basis of the substantive standards elucidated in subparagraph (1).

B. Rule 3.8(f) as Applied to Grand Jury Subpoenas.

Because local rulemaking authority is at a lower ebb in the grand jury context, we ease first into those relatively shallow waters.

The grand jury is deeply rooted in Anglo-American tradition and is "a constitutional fixture in its own right." *United States* v. *Williams*, 504 U.S. 36, 47 (1992) (internal quotation marks omitted). It is not a part of either the Executive or Judicial Branch, but, rather, "a kind of buffer . . . between the Government and the people." *Id.* Accordingly, "any power federal courts may have to fashion, on their own initiative, rules of grand jury procedure is a very limited one, not remotely comparable to the power they maintain over their own proceedings." *Id.* at 50. A local rule may not "substantially alter[] the traditional relationships

between the prosecutor, the constituting court, and the grand jury itself." *Id.* Nor may a local rule trench upon any core attribute of the grand jury, including: "1) its independence from the court's supervision; 2) its broad investigative powers; 3) the presumption of validity accorded its subpoenas; 4) the secrecy of its proceedings; [or] 5) its general freedom from procedural detours and delays." *Whitehouse*, 53 F.3d at 1357. It is against this backdrop that we take the measure of Local Rule 3.8(f) as it pertains to grand jury subpoenas.

We do not write on a pristine page. As the defendants repeatedly remind us, *Whitehouse* held that a local rule requiring judicial preapproval for the service of an attorney subpoena neither undermined the historic role of the grand jury nor interfered with its essential attributes. *See id.* at 1357-62. But this holding rested squarely on the panel's determination that the particular local rule worked no substantive change in the governing law because judicial preapproval would be granted or denied under traditional motion-to-quash standards. *See id.* at 1357-58 & nn.12-13 (explaining that the rule "merely authorizes district courts to reject a prosecutor's attorney-subpoena application for the traditional reasons justifying the quashing of a subpoena"); *see also* Fed. R. Crim. P. 17(c) (authorizing courts to quash a subpoena "if compliance would be unreasonable or oppressive"). In so holding, the *Whitehouse* court brushed aside the seemingly more rigorous criteria delineated in the comment to the rule, on the ground that the comment was merely advisory. *See* 53 F.3d at 1358 n.12. So viewed, the rule imposed no additional burden on grand jury independence because courts, in theory, would apply the motion-to-quash standards that govern under Rule 17,

not the comment's suggested criteria, in determining whether to approve an attorney subpoena request.[4]

The Rhode Island rule's saving grace is absent here. Local Rule 3.8(f) differs significantly in that it imposes new substantive requirements for judicial preapproval of grand jury subpoenas. In so doing, the rule alters the grand jury's historic role, places it under overly intrusive court supervision, curbs its broad investigative powers, reverses the presumption of validity accorded to its subpoenas, undermines the secrecy of its proceedings, and creates procedural detours and delays. It therefore impermissibly interferes with grand jury proceedings. *See* 1 Hazard & Hodes, *supra*, § 3.8:701, at 702 (Supp. 1997) ("Rule 3.8(f) in its original form seemed clearly invalid . . . as applied to . . . federal grand jury subpoenas to criminal defense lawyers.").

Because any one of these vices would suffice to invalidate the rule as applied to grand jury subpoenas, we confine our discussion to two of the most glaring defects: Local Rule 3.8(f)'s impact on grand jury secrecy and its potential as an incubator for delay. In *United States* v. *R. Enterprises, Inc.*, 498 U.S. 292 (1991), the Court held that the government could not be required to demonstrate that the materials sought by a grand jury subpoena were relevant. *See id.* at 298-

[4] To be sure, the panel also suggested that the preapproval process did not impede grand jury independence because it did not apply to subpoenas sought by the grand jury acting independently from the prosecutor. *See Whitehouse*, 53 F.3d at 1357. While we are bound by the holding of *Whitehouse*, we eschew this component of its reasoning. As a practical matter, grand jury subpoenas are almost universally issued by and through federal prosecutors. *See, e.g., In re Grand Jury Matters (United States)*, 751 F.2d 13, 16 (1st Cir. 1984). Moreover, the Supreme Court has explicitly rejected the notion that an otherwise impermissible rule of grand jury procedure becomes permissible if it is enforced against the prosecutor instead of the grand jury itself. *See Williams*, 504 U.S. at 53.

99. The Court explained that such a requirement " 'would saddle a grand jury with minitrials and preliminary showings,' " *id.* (quoting *United States* v. *Dionisio*, 410 U.S. 1, 17 (1973)), and would "threaten[] to compromise 'the indispensable secrecy of grand jury proceedings,' " *id.* at 299 (quoting *United States* v. *Johnson*, 319 U.S. 503, 513 (1943)); *see also* Fed. R. Crim. P. 6(e) (cloaking grand jury proceedings in secrecy). Requiring a prosecutor to show that subpoenaed evidence is essential and not otherwise feasibly obtainable would have the same two impermissible effects. Consequently, we hold that Local Rule 3.8(f), as it pertains to grand jury subpoenas, encroaches unduly upon grand jury prerogatives and, therefore, is *ultra vires*.

C. Rule 3.8(f) as Applied Outside the Grand Jury Context.

Outside the grand jury context, Stern asseverates that Local Rule 3.8(f) is beyond the district court's competency because it goes past the "matters of detail" appropriate for local rulemaking, Fed. R. Crim. P. 57 advisory committee's note, and works a fundamental procedural change. This argument depends heavily on *Miner* v. *Atlass*, in which the Court held that a local admiralty rule authorizing oral discovery depositions exceeded the district court's rulemaking authority. *See* 363 U.S. at 650. The Court reasoned that this innovation, "though concededly 'procedural,' may be of as great importance to litigants as many a 'substantive' doctrine." *Id.* Accordingly, it was too basic to be effectuated through local rulemaking. *See id.*

In *Colgrove* v. *Battin*, 413 U.S. 149 (1973), the Court elaborated on this concept, explaining that "[t]he 'basic procedural innovations' to which Miner referred are

those aspects of the litigatory process which bear upon the ultimate outcome of the litigation." *Id.* at 163 n.23. Applying this taxonomy, the Court upheld a local rule providing for six-member civil juries in lieu of traditional twelve-member juries because the party challenging the rule had not shown any discernible difference in the results reached. *See id.* Synthesizing *Miner* and *Colgrove*, we conclude that the relevant inquiry is whether Local Rule 3.8(f), applied outside the grand jury context, is apt to affect the ultimate outcome of criminal proceedings. *See Eash* v. *Riggins Trucking Inc.*, 757 F.2d 557, 569 (3d Cir. 1985) (en banc).

The answer to this inquiry depends, in the first instance, on current practice under Fed. R. Crim. P. 17. Rule 17(c) authorizes subpoenas for the production of documentary evidence, objects, and the like. That rule prescribes a procedure and a standard for challenging such subpoenas: "The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive." The Supreme Court elucidated the meaning of this standard in *United States* v. *Nixon*, 418 U.S. 683 (1974), holding that a subpoena duces tecum is not "unreasonable or oppressive" if the proponent establishes relevancy, admissibility, and specificity. *See id.* at 700.

Roughly the same standard applies to subpoenas compelling the attendance of witnesses, *i.e.*, subpoenas ad testificandum. Although Rule 17(a), which governs such subpoenas, does not provide explicitly for quashal or modification, courts routinely have entertained motions seeking such relief and decided them by reference to comparable principles. Specifically, a subpoena ad testificandum survives scrutiny if the party serving it can show that the testimony sought is both relevant and material. *See United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 867 (1982); *United States* v. *Campbell*, 874 F.2d 838, 850-51 (lst Cir. 1989).

These traditional standards for quashal of trial subpoenas form the template for further inquiry here.[5] As we have said, Local Rule 3.8(f) requires a prosecutor, before serving an attorney subpoena, to demonstrate that the information sought is essential, not privileged, and not otherwise feasibly available. These are significant departures from prior practice, and they raise the bar for obtaining relevant and material evidence. Collectively, they work changes too fundamental to be accomplished under the aegis of the district courts' local rulemaking power.

In particular, the "essentiality" and "no feasible alternative" requirements are substantially more onerous (and, thus, more restrictive) than the traditional motion-to-quash standards. Essentiality is obviously a more demanding criterion than relevancy or materiality. By like token, Rule 17 jurisprudence contains no corollary to the principle that a subpoena issued to one source cannot stand if the information sought is (or may be) available from some other source.

Two examples illustrate these points. Suppose, in a robbery case, that a defense lawyer received a lump-sum advance payment for services in the precise amount of the purloined funds from a client with no visible means of support. There is other evidence linking the client to the robbery, so the billing information could not fairly be described as "essential" to the pros-

[5] It bears emphasis that the motion-to-quash standards applicable to trial subpoenas historically have not been applied to grand jury subpoenas. *See R. Enters.*, 498 U.S. at 298-99 (holding that recourse to the Nixon criteria would unduly interfere with grand jury proceedings); *In re Grand Jury Proceedings (Hill)*, 786 F.2d 3, 5 n.2 (1st Cir. 1986) (per curiam) (declining to require a showing of "need" or "relevance" before a court may enforce a grand jury subpoena directed to an attorney). Because grand jury subpoenas are *sui generis*, we use the term "trial subpoenas" as a shorthand for all other subpoenas (*e.g.*, subpoenas issued in the course of pretrial hearings).

ecution. Hence, Local Rule 3.8(f) would prohibit the prosecutor from serving a subpoena on the defense attorney, notwithstanding the unarguable materiality and relevancy of the retainer information. Next, consider unprivileged documents in a lawyer's file relating to a complex, and possibly fraudulent, international real estate transaction. These documents may be obtainable without a subpoena duces tecum directed to the lawyer, but only through time-consuming, relatively expensive (but still feasible) alternative means. Local Rule 3.8(f) would prohibit an attorney subpoena, even though the situation easily satisfies standards of relevancy, admissibility, and specificity.

These examples are not eccentric hypotheticals, but, rather, fairly typical of the sort of situation in which a prosecutor might wish to serve an attorney subpoena (others easily can be conceived). We think that they demonstrate convincingly that Local Rule 3.8(f) imposes novel requirements that threaten to preclude the service of otherwise unimpeachable subpoenas and thus restrict the flow of relevant, material evidence to the factfinder. Considering that compelling the production of evidence is of "great importance" to litigants, *Miner*, 363 U.S. at 650, this is a fairly drastic alteration of the rules — too basic to be effected through local rulemaking.[6] *See Klubock*, 832 F.2d at 673 (equally divided en banc) (opinion of Breyer, J.) (suggesting that a local rule imposing standards of review for attorney subpoenas stricter than tradition-

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[6] In striking down a local rule in *Miner*, the Court repeatedly cited the fact than an analogous national rule had been considered and rejected. *See Miner*, 363 U.S. at 644-45, 648-51. The situation here is reminiscent of that scenario: Congress declined to enact a bill sponsored by Senator Paul Simon that was designed to "provide procedural safeguards with respect to the issuance of lawyer client subpoenas." 134 Cong. Rec. 21,589, 21,599 (1988).

al motion-to-quash standards would fall outside the district court's rulemaking authority).

Moreover, unlike in *Colgrove*, 413 U.S. at 163 n.23, there has been no showing here that Local Rule 3.8(f) will not affect the outcome of criminal proceedings. Indeed, there is every reason to believe that the opposite is true. Local Rule 3.8(f) imposes new substantive requirements applicable only to prosecutors and creates a novel procedural device to ensure that these requirements are enforced. The likely result will be fewer attorney subpoenas served by the government; as the comment to the rule makes clear, the goal is "to limit the issuance of lawyer subpoenas." Certain evidence, as long as a court finds that it is not "essential," will never reach the trier of fact. So, too, when the government decides that the "feasible alternative" to an attorney subpoena is not worth the additional effort. In short, Local Rule 3.8(f), if permitted to stand, will make it measurably more difficult for prosecutors to secure convictions. The magnitude of this new burden is simply too large to be imposed by local rule. Accordingly, the rule cannot stand.

The Third Circuit reached the same conclusion with respect to a closely analogous rule. At issue there was Pennsylvania's analog to Local Rule 3.8(f), which required judicial preapproval for attorney subpoenas in criminal proceedings. *See Baylson*, 975 F.2d at 104. The comment to the rule[7] stipulated that approval normally would be denied unless the court found that the information sought was relevant and not confidential or privileged, that compliance would not be unreasonable or oppressive, that the primary purpose of the subpoena was not harassment, and that there were no

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[7] The Third Circuit, unlike the panel in *Whitehouse*, see 53 F.3d at 1358 n.12, assumed that trial courts would not ignore the comment in applying the rule. *See Baylson*, 975 F.2d at 109.

feasible alternative means of obtaining the information sought. *See id.* Although only the "no feasible alternative" requirement was substantively new, the court held that the rule went beyond the "matters of detail" contemplated by Fed. R. Crim. P. 57 and thus transcended local rulemaking authority. See id. at 108-09. Because it requires essentiality as well, Local Rule 3.8(f) represents an even greater encroachment than the rule that confronted the *Baylson* court.

D. Section 530B.

Shortly after the hearing in the district court, Congress passed an omnibus budget bill. The bill contained a provision entitled "Ethical standards for attorneys for the Government," now codified as section 530B, which provides that:

> An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.

28 U.S.C. § 530B(a). Bar Counsel asserts that this passage cures any conflict between Local Rule 3.8(f) and other federal law. We do not agree.

"Because of the fundamental importance of the principles shielding federal installations and activities from regulation by the States, an authorization of state regulation is found only when and to the extent there is a clear congressional mandate, specific congressional action that makes this authorization of state regulation clear and unambiguous." *Hancock* v. *Train*, 426 U.S. 167, 179 (1976) (footnotes and internal

quotation marks omitted). We believe it is reasonable to require comparable specificity before inferring congressional intent to abandon the goal of national consistency anent rules of federal practice. Moreover, that benchmark is not attainable here: it simply cannot be said that Congress, by enacting section 530B, meant to empower states (or federal district courts, for that matter) to regulate government attorneys in a manner inconsistent with federal law. We explain briefly.

The federal rules of procedure, unlike state laws, are nationally uniform. *See* 28 U.S.C. § 2071(a); Fed. R. Crim. P. 57(a)(1); Fed. R. Civ. P. 83(a)(1). In the area of ethics, however, federal district courts generally have adopted their own rules, often modeled on the rules of the state in which they sit, but sometimes with significant deviations. *See, e.g.*, D. Mass. R. 83.6(4)(B) (stating that SJC ethics rules govern "except as otherwise provided by specific rule of this court"). The potential for conflict between state and federal law therefore should have been obvious, but section 530B does not speak to the issue. Instead, Congress directed the Attorney General to fill out the details of enforcement by regulation. *See* 28 U.S.C. § 530B(b) (empowering the Attorney General to promulgate implementing regulations). These regulations dispel the notion that section 530B grants states and lower federal courts the power, in the guise of regulating ethics, to impose strictures that are inconsistent with federal law. *See* 28 C.F.R. § 77.1(b) (directing that section 530B "should not be construed in any way to alter federal substantive, procedural, or evidentiary law").

The Eleventh Circuit recently had the opportunity to consider the effect of section 530B. That court rejected the argument that the statute cured an incipient conflict between a state ethics rule (which had been incorporated into the federal district court's local

rules) and the federal rules of evidence. *See United States* v. *Lowery*, 166 F.3d 1119, 1124-25 (11th Cir.), *cert. denied*, 120 S.Ct. 212 (1999). The court wrote: "If Congress wants to give state courts and legislatures veto power over the admission of evidence in federal court, it will have to tell us that in plain language using clear terms." *Id.* at 1125. We agree with this pronouncement and apply it here: because Local Rule 3.8(f) impermissibly interferes with federal grand jury practice and transcends district cour rulemaking authority, section 530B cannot salvage it.

If more were needed — and we doubt that it is — Local Rule 3.8(f) clearly extends beyond the shelter that section 530B provides. Although the statutory text, which refers to "State laws and rules, and local Federal court rules, governing attorneys," is arguably susceptible to a broad interpretation, we have noted before that a statute's caption may assist in clarifying ambiguities. *See, e.g., Massachusetts Ass'n of HMOs*, 194 F.3d at 180; *Berniger* v. *Meadow Green-Wildcat Corp.*, 945 F.2d 4, 9 (lst Cir. 1991). The title of the statute here ("Ethical standards for attorneys for the Government") removes any doubt about its scope: section 530B applies only to ethical standards. This conclusion becomes irresistible in light of the legislative history and implementing regulations. *See, e.g.*, H.R. Conf. Rep. No. 105-825, at 1102 (1998); 144 Cong. Rec. E301 (daily ed. Mar. 5, 1998) (statement of sponsor, Rep. McDade); 28 C.F.R. §§ 77.1(b), 77.2(h) .[8]

That ends the matter. Local Rule 3.8(f), though doubtless motivated by ethical concerns, has outgrown

[8]Unlike Bar Counsel, we do not ascribe much weight to the dire predictions of broader applicability made by *opponents* of section 530B. *See, e.g.*, 144 Cong. Rec. S12,996-97 (daily ed. Nov. 12, 1998) (statement of Sen. Abraham); 144 Cong. Rec. S12,798-99 (daily ed. Oct. 21, 1998) (statement of Sen. Hatch).

those humble beginnings. Substance, not form, must control. *See* 28 C.F.R. § 77.2(h)(1) (explaining that the applicability of section 530B does not depend on "whether or not [the state or local] rule is included in a code of professional responsibility for attorneys"). As written, Local Rule 3.8(f) is more than an ethical standard. It adds a novel procedural step — the opportunity for a pre-service adversarial hearing — and to compound the matter, ordains that the hearing be conducted with new substantive standards in mind.

In recommending the deletion of subparagraph (2) from the former ABA Model Rule, the Standing Committee explained that the judicial preapproval provision was an anomaly: "Rather than stating a substantive ethical precept, it sets out a type of implementing requirement that is properly established by rules of criminal procedure rather than established as an ethical norm." ABA Standing Comm. on Ethics and Prof'l Responsibility, Report 101, at 7 (Aug. 1995). We agree with this assessment. Because Local Rule 3.8(f) goes beyond the realm of ethics, section 530B neither rescues it nor renders the instant case moot.[9] *Cf. CSC II,* 189 F.3d at 1283-89 (relying on section 530B to uphold an ethics rule consisting of subparagraph (1) but without any provision for an adversarial hearing).

IV. CONCLUSION

We need go no further. We conclude that the authority of the district court to adopt Local Rule 3.8(f) is ripe for judicial review and that the two subparagraphs of the rule are to be read together. Thus, the substantive standards delineated in subparagraph (1) must guide a court in determining whether to approve an attorney

[9] For essentially the same reason, Local Rule 3.8(f) is beyond the district court's inherent authority to regulate the conduct of attorneys appearing before it.

subpoena in a pre-service hearing held pursuant to subparagraph (2). We also conclude that the adoption of Local Rule 3.8(f) exceeded the district court's lawful authority to regulate both grand jury and trial subpoenas. Finally, we conclude that 28 U.S.C. § 530B does not repair these defects. Accordingly, we hold that Local Rule 3.8(f) is without force or effect.

Reversed.

United States Court of Appeals
For the First Circuit

No. 99-1839

DONALD K. STERN,
Plaintiff, Appellant,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, ET AL.,
Defendants, Appellees.

ORDER OF THE COURT

Before
TORRUELLA, *Chief Judge*,
COFFIN, *Senior Circuit Judge*,
SELYA, BOUDIN, STAHL, LYNCH*
and LIPEZ, *Circuit Judges*

Entered: June 22, 2000

The panel of judges that rendered the decision in this case having voted to deny the petitions for rehearing and the suggestions for rehearing en banc having been carefully considered by the judges of the Court in regular, active service not recused, and an insufficient number of votes having been cast in favor of the appeal being heard or reheard by the Court en banc,

It is ordered that the petitions for rehearing and the suggestions for rehearing en banc be denied.

Dissent follows.
By the Court:

PHOEBE MORSE, Clerk

By: s/ Janice O'Neil
Chief Deputy Clerk

* Judge Lynch is recused from this case.

TORRUELLA, *Chief Judge*, with whom Judges Stahl and Lipez join, dissenting from the denial of the petitions for rehearing en banc.

In this case there has been a recusal by one active judge. As interpreted by this Court in *United States* v. *Leichter*, 167 F.3d 667 (lst Cir. 1999), recused judges are counted for purposes of determining what constitutes the absolute majority of the active members deemed necessary for en banc hearing. *See* 28 U.S.C. 46(c); Fed. R. App. P. 35(a) (1) and (2). Thus, there are not sufficient votes favoring said outcome. This is unfortunate because the substance of the panel opinion makes it a prime candidate for en banc consideration in that the panel opinion both (1) "fails to maintain uniformity with this Court's [prior] decisions" and (2) "involves a question of exceptional importance." *See* Fed. R. App. P. 35(a)(1) and (2).

Leaving aside the result in *United States* v. *Klubock*, 639 F. Supp. 117 (D. Mass. 1986), *aff'd*, 832 F.2d 664 (lst Cir. 1987) (equally divided en banc court), it is difficult to conclude that the panel opinion in *Stern* v. *United States District Court*, No. 99-1839, slip op. (lst Cir. Apr. 12, 2000), is anything but a reversal of the panel opinion in *Whitehouse* v. *United States District Court*, 53 F.3d 1349 (lst Cir. 1995). This outcome contravenes sound and well-established legal principles regarding the binding nature of panel opinions upon later panels considering the same or closely similar issues. *See Metcalf & Eddy Inc.* v. *Puerto Rico Aqueduct & Sewer Auth.*, 945 F.2d 10, 12 (lst Cir. 1991) ("We have held, with regularity bordering on the monotonous, that in a multi-panel circuit, newly constituted panels are, by and large, bound by prior panel decisions closely in point . . . . The orderly development of the law, the need for stability, the value of results being predictable over time, and the importance of

evenhanded justice all counsel continued fidelity to this principle."); *United States* v. *Wogan*, 938 F.2d 1446, 1449 (lst Cir. 1991) ("We have held, time and again, that in a multi-panel circuit, prior panel decisions are binding upon newly constituted panels in the absence of supervening authority sufficient to warrant disregard of established precedent.").

In *Whitehouse*, in considering a disciplinary rule similar to the one before the *Stern* panel, we reversed the district court's invalidation of the rule and stated:

> We disagree with the district court for three reasons. First, Local Rule 3.8(f) is a prophylactic rule aimed at, and principally affecting, prosecutors, not the grand jury. As such, the Rule regulates the conduct of attorneys appearing before the court—a power well within the limits of a federal district court's rulemaking authority—and not the grand jury per se. Second, we think the district court's reliance on *Williams* [*United States* v. *Williams*, 504 U.S. 36 (1992)], is misplaced. Finally any incidental effect the Rule has on the grand jury is minimal, and outweighed by the important interests served by the rule.

Whitehouse, 53 F.3d at 1357.

By focusing on the third point mentioned in *Whitehouse*, the *Stern* panel mischaracterizes the central ruling in Whitehouse, which is that a district court has authority to regulate prosecutors' conduct qua members of the bar, as in the case of any other members of the bar. Furthermore, the *Stern* panel totally overlooks the importance given by the *Whitehouse* panel to a local rule which was designed to protect the attorney-client relationship and fails to give due deference to district courts in regulating matters peculiarly

within their daily experience. *See Whitehouse*, 53 F.3d at 1360-62.

The fundamental issue of the district court's recognized authority to regulate attorney conduct (in contrast to its very limited authority to regulate the grand jury itself) warranted no more than a footnote in the panel decision in *Stern*, in which the panel stated that "[w]hile we are bound by the holding of *Whitehouse*, we eschew this component of its reasoning." *Stern*, slip op. at 25 n.4. The *Stern* panel's support for such a rejection of binding circuit precedent consisted merely of (1) a statement that grand jury subpoenas are normally issued by prosecutors and not by the grand jury itself (which is true, but is irrelevant to the distinction between the district court's authority in the two areas of attorney conduct and grand jury administration) and (2) a citation to *United States* v. *Williams*, *supra*, which we explicitly considered in *Whitehouse* and found distinguishable. Based on these actions alone, en banc review is required. *See* Fed. R. App. P. 35(a)(1).

But there are additional grounds. There are few matters that are more central to the district court's ability to administer justice than is the prudent exercise of its supervisory powers over the bar. This is a power that has been recognized as inherent in the courts. The establishment of rules of conduct for attorneys is an integral part of this power. The talismanic word is not "grand jury" but "ethics." A member of the bar is subject to rules of conduct that govern professional actions irrespective of the forum. A prosecutor is not immunized from ethical considerations because his or her conduct takes place in connection with grand jury proceedings. That is all that is involved in this and previously decided cases. *See Whitehouse, supra.*

These considerations point to the undeniable con-

clusion that the issues raised by this appeal are "question[s] of exceptional importance" meriting a rehearing en banc by the full court. Fed. R. App. P. 35(a)(2).

I dissent from the denial of the petitions for rehearing en banc.

Supreme Court, U.S.
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(2)

No. 00-444

In the
Supreme Court of the United States
October Term, 2000

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, et al.,
Petitioners,

v.

DONALD K. STERN, in his Official Capacity as United States Attorney for the District of Massachusetts,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY TO BRIEF IN OPPOSITION

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In the
Supreme Court of the United States

October Term, 2000

No. 00-444

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, et al.,
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v.

DONALD K. STERN, in his Official Capacity as United States Attorney for the District of Massachusetts,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY TO BRIEF IN OPPOSITION

Respondent offers no persuasive reason why this Court should not grant review both of the First Circuit's construction of the Citizens Protection Act, 28 U.S.C. § 530B, and of the First Circuit's practice of counting a recused judge as a judge "in regular active

service" for purposes of determining whether to grant a petition for rehearing en banc under Fed. R. App. P. 35(a) and 28 U.S.C. § 46(c). As the Judges demonstrated in their Petition for Certiorari, guidance from this Court is necessary to clarify which rules "governing attorneys" the Act requires federal prosecutors to follow in the thousands of criminal investigations and prosecutions that take place each year. Without assistance from this Court, confusion over prosecutors' ethical obligations will continue to disrupt the administration of justice nationwide. In addition, this Court should review the First Circuit's en banc vote-counting procedure in order to eliminate the sharp split among the courts of appeals in their interpretations of Fed. R. App. P. 35(a) and 28 U.S.C. § 46(c), a split that subverts the goal of nationally uniform appellate procedure.

ARGUMENT[1]

1. Respondent's Opposition is perhaps most notable for the arguments it does not make. First, at no point in his Opposition does Respondent question the correctness of the Petition's central thesis, namely, that the scope of the Citizens Protection Act is a question of national importance that should be settled by this Court. The Opposition nowhere challenges the Judges' contention that resolution of the current confusion over which state ethics rules federal prosecutors must follow under the Act is vital to the administration of the federal criminal justice system. Nor does Respondent at any point dispute that the Citizens

[1] References to the Respondent's Opposition are indicated as "Opp." followed by the appropriate page numbers. References to the Appendix to the Judge's Petition for Certiorari and to the Joint Appendix submitted to the First Circuit are indicated as "Pet. App." and "C.A. App." respectively.

Protection Act engendered strong debate in Congress precisely because it marked a change from then-existing Department of Justice policy, a policy that required federal prosecutors to abide by state rules of ethics only insofar as the state rules did not conflict with existing federal law or rules. *See* Richard L. Thornburgh, *Memorandum from Attorney General to All Justice Department Litigators*, June 8, 1989, reprinted in *In re Doe*, 801 F. Supp. 478, 489 (D.N.M. 1992). The Act was controversial precisely because it was designed to subject government attorneys to *all* state rules governing attorneys, including those rules that might conflict with preexisting federal law.[2] By granting the Petition, this Court can end the confusion over the scope of the Act and fully effect the intent of Congress that federal prosecutors be subject to all state rules governing attorneys.

2. Nor do any of the arguments that Respondent does raise in his Opposition support a denial of certiorari. Respondent contends that the Judges did not present their arguments concerning the scope of the Citizens Protection Act to the courts below. Opp. 19 ("Petitioners' claim is not properly before the Court. . . . The only issue presented to or decided by either court below was [] whether the United States District Court for the District of Massachusetts has the power to promulgate Local Rule 3.8(f) as a local district court rule."). This assertion is flatly contradicted by the

---

[2] Despite Respondent's assertions to the contrary, *See* Opp. 13, 21, the Judges do not concede that the First Circuit was correct either in its interpretation of Rule 3.8(f) or in its conclusion that Rule 3.8(f) conflicts with the Federal Rules of Criminal Procedure. The Judges have sought to present only truly certworthy questions in their Petition. They did not raise other, less certworthy, issues — despite their belief that such issues were erroneously decided below — because the issues are not relevant to the grounds on which the Judges seek review in this Court. *See* Sup. Ct. R. 10.

opinions of the courts below. See Pet. App. A7 n.5, A48-A51. That Respondent would make such an assertion is puzzling, especially since Respondent's own brief explicitly mentions the First Circuit's ruling on the question of whether § 530B applies Rule 3.8(f) to federal prosecutors directly, regardless of any conflict with existing federal law. Opp. 11-12. Respondent's citation to a statement by Bar Counsel that he would initiate proceedings under Local Rule 3.8(f) only "pursuant to the applicable Local Rules" is similarly wide of the mark. C.A. App. 98. The record below reveals that Bar Counsel made that statement in an affidavit executed prior to the enactment of the Citizens Protection Act. C.A. App. 100. The affidavit therefore cannot in any way be interpreted as preventing Bar Counsel from initiating appropriate proceedings in federal court pursuant to the Act's mandate.

Respondent reflects at length on the question of whether the First Circuit's decision conflicts with that of the Tenth Circuit in *United States* v. *Colorado Supreme Court*, 189 F.3d 1281 (10th Cir. 1999), but fails to rebut the heart of the Petition's argument concerning this conflict. Respondent contends that the decisions of the two circuit courts are not in conflict because a different attorney-subpoena rule was at issue in each case. Opp. 14-16. That difference, however, is irrelevant to the conflict. The conflict, simply put, is this: the First and Tenth Circuits have disagreed over the proper test for evaluating whether a particular state rule falls within the reach of the Citizens Protection Act. Whereas the Tenth Circuit employed a four-factor test to determine whether the Colorado rule applied to government attorneys under the Act, *Colorado Supreme Court*, 189 F.3d at 1287, the First Circuit simply looked to whether the Massachusetts rule created a "novel procedural step."

Pet. App. A51. The difference in the tests necessarily results in the Act having a different scope in the First Circuit than it does in the Tenth Circuit. This Court should grant the writ to resolve this split.

3. In addition, this Court should review the First Circuit's denial of the Judges' request for rehearing en banc. Respondent wholly fails to address the fundamental argument raised in the Judges' Petition, namely, that Fed. R. App. P. 35(a) was adopted by this Court as part of a deliberate effort to ensure the "effective and *uniform* administration of federal appellate justice." *See* 16A Charles Alan Wright et al., *Federal Practice & Procedure* § 3945, at 10 (3d ed. 1999) (emphasis added). The current state of affairs, in which the phrase "in regular active service" is considered by five courts of appeals to include recused judges, and by eight courts of appeals not to include such judges, runs directly counter to this goal of uniformity. *See Gulf Power Co.* v. *FCC*, 226 F.3d 1220, 1225 (11th Cir. 2000) ("[T]here is no good reason why a uniform rule [regarding the treatment of recused judges] should not be followed in all the circuits.") (Carnes, J., concerning the denial of rehearing en banc). Review by this Court is necessary to remove "the appearance of rights determined by happenstance" that results from this circuit split. *Lewis* v. *University of Pittsburgh*, 725 F.2d 910, 930 (3d Cir. 1983) (Statement Sur Petition for Rehearing). As Judge Carnes of the Eleventh Circuit recently explained, "[a] litigant who loses before a panel in [one] circuit should not be treated differently in terms of the basic en banc procedures than one who loses before a panel in the same circumstances in another circuit. The definition of 'majority of the circuit judges who are in regular active service' should not vary with geography." *Gulf Power Co.*, 226 F.3d at 1225.

Faced with this stark conflict in circuit practice, Respondent suggests only that any "reconsideration of appellate en banc procedure . . . should be undertaken in the context of a proposal to revise the federal rules, not on certiorari review." Opp. 26 n.14. This suggestion is misguided. The present conflict among the circuits has arisen not because of a *lack* of a federal rule governing en banc review, but because of a *difference of interpretation* concerning such a rule. The courts of appeals have split in their interpretation of the meaning of Rule 35(a)'s phrase "in regular active service." Eight circuits have interpreted the phrase not to include recused judges, whereas five circuits, including the First Circuit, have reached the opposite conclusion. *See Gulf Power Co.*, 226 F.3d at 1222. This split requires review by this Court. It does not require, as Respondent suggests, that Rule 35(a) be revised or amended. This is a classic example of a circuit split concerning the meaning of an existing rule; as is usual and appropriate in such situations, what is needed to resolve the split is not revision of the rule but final review by this Court.

Whatever precedential weight the Court's dicta in *Shenker* v. *Baltimore & Ohio Ry. Co.*, 374 U.S. 1, 5 (1963) may have once been entitled to, events subsequent to that decision have rendered that dicta moot. As Respondent himself points out, "'general rules of practice and procedure' promulgated by this Court supersede '[a]ll laws in conflict with such rules.'" Opp. 26 n.14 (quoting 28 U.S.C. § 2072(a) and (b)). Therefore, to the extent that there is any conflict between Rule 35(a) and 28 U.S.C. § 46(c), Rule 35(a) governs. While this Court may have been unwilling to set a uniform standard for procedures governing en banc review at the time it decided *Shenker*, it cannot be said that the Court was similarly unwilling four years later when it promulgated Rule 35(a) as part of

a set of federal rules designed to achieve uniformity of procedure across the federal appellate system. Respondent's argument ignores this history and instead suggests that this Court, as part of an effort to standardize federal appellate procedure, deliberately adopted a rule intended to permit conflicting en banc practices to flourish. By granting review, this Court can restore Rule 35(a) to its intended position: as a nationally uniform rule governing whether a majority of a circuit's judges in regular active service favor en banc review.

4. This Court should grant review not only to promote uniformity of en banc vote-counting procedure, but also because of the pernicious effects wrought by the First Circuit's absolute-majority requirement. Judge Carnes, in an extensive analysis not referenced in Respondent's discussion of *Gulf Power Co.*, explained the many perils of such a requirement. *See Gulf Power Co.*, 226 F.3d at 1222-25.[3] In *Gulf Power Co.* itself, five of the Eleventh Circuit's twelve active judges were recused from participating in the decision of whether to grant en banc review, leaving only seven judges to consider the petition for rehearing. Thus, under the absolute-majority rule employed by the Eleventh Circuit, each of the seven non-recused judges would have had to vote for rehearing en banc in order for it to occur. As Judge Carnes noted, the absolute-majority rule in such a situation permits a single judge to prevent the case from being reheard en banc "no matter how strongly the remaining six non-disqualified judges thought it should be." *Id.* at 1222. Just as one judge was able to thwart the will of six in *Gulf Power Co.*, two judges were able to thwart the will of

[3] While Judge Carnes is mistaken in his view that amendment to Rule 35(a), rather than review of the rule on certiorari, is necessary, his analysis of the absolute-majority requirement's many flaws remains instructive.

three in the case at bar. By granting review, this Court can make clear that the correct interpretation of Rule 35(a) and 28 U.S.C. § 46(c) does not countenance such countermajoritarian results.

CONCLUSION

For the foregoing reasons, and for the reasons set forth previously, the Judges' Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Nos. 00-425 and 00-444

In the Supreme Court of the United States

DANIEL C. CRANE, PETITIONER

v.

DONALD K. STERN

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, ET AL., PETITIONERS

v.

DONALD K. STERN

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Local Rule 3.8(f), which was adopted by the United States District Court for the District of Massachusetts to govern subpoenas directed to attorneys in grand jury or other criminal proceedings, exceeded the district court's rulemaking authority.

2. Whether a court of appeals may require the affirmative vote of a majority of all active circuit court judges to rehear a case en banc under 28 U.S.C. 46(c), regardless of whether one or more of those judges have recused themselves from consideration of the en banc petition.

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In the Supreme Court of the United States

No. 00-425

DANIEL C. CRANE, PETITIONER

v.

DONALD K. STERN

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, ET AL., PETITIONERS

v.

DONALD K. STERN

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-27a[1]) is reported at 214 F.3d 4. The opinion of the district court (Pet. App. 32a-50a) is reported at 184 F.R.D. 10.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 2000. A petition for rehearing was denied on

[1] All references to "Pet. App." are to the appendix to the petition for a writ of cetiorari in No. 00-425.

June 22, 2000 (Pet. App. 27a-28a). The petition for a writ of certiorari in No. 00-425 was filed on September 18, 2000, and the petition for a writ of certiorari in No. 00-444 was filed on September 20, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns the authority of a district court to promulgate a local district court rule. The United States District Court for the District of Massachusetts, pursuant to its authority under 28 U.S.C. 2071[2] and Federal Rule of Criminal Procedure 57(a)(1)[3], promulgates local rules to govern its day-to-day business. Under Local Rule 83.6(4)(B), conduct of federal prosecutors admitted to practice before the District Court that "violate[s] the ethical requirements and rules concerning the practice of law of the Commonwealth of Massachusetts, shall constitute misconduct and shall be

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[2] Section 2071 provides in pertinent part:

> (a) The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.
>
> * * * * *
>
> (f) No rule may be prescribed by a district court other than under this section.

[3] Federal Rule of Criminal Procedure 57(a)(1) provides in pertinent part:

> Each district court acting by a majority of its district judges may, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice. A local rule shall be consistent with—but not duplicative of—Acts of Congress and rules adopted under 28 U.S.C. § 2072.

grounds for discipline." Rule 83.6(4)(B) also allows the district court to opt out of any particular Massachusetts rule "by specific rule of this court."

In 1997, the Supreme Judicial Court for the Commonwealth of Massachusetts amended Rule 3.8 of the Massachusetts Rules of Professional Conduct to provide in pertinent part:

> The prosecutor in a criminal case shall:
>
> * * * * *
>
> (f) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless:
>
> (1) the prosecutor reasonably believes:
>
> (i) the information sought is not protected from disclosure by any applicable privilege;
>
> (ii) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
>
> (iii) there is no other feasible alternative to obtain the information; and
>
> (2) the prosecutor obtains prior judicial approval after an opportunity for an adversarial proceeding.[4]

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[4] As quoted in text, the Rule was identical to the 1990 American Bar Association (ABA) Model Rule of Professional Conduct 3.8(f). ABA Standing Committee on Ethics and Professional Responsibility and Section of Criminal Justice, Report 118, at 1 (1990). The ABA rule, however, was accompanied by a comment stating that "an adversarial hearing is afforded in order to assure an independent determination that the applicable standards are

Pet. App. 3a-4a.

Respondent Donald K. Stern, the United States Attorney for the District of Massachusetts, asked the district court not to adopt Rule 3.8(f) via Local Rule 83.6(4)(B). The District Court declined the request, and Rule 3.8(f) as adopted went into effect in the district court on January 1, 1998. Pet. App. 5a.

On May 13, 1998, respondent filed in the United States District Court for the District of Massachusetts a complaint for declaratory and injunctive relief against the district court, the judges of the district court, and Bar Counsel for the Board of Bar Overseers for the Commonwealth of Massachusetts, an attorney who enforces the Massachusetts Rules of Professional Conduct.[5] Respondent alleged that Local Rule 3.8(f)

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met." Pet. App. 4a. That comment was not included with the Massachusetts rule.

As the court of appeals noted, "[a]fter the Third Circuit struck down a bar rule patterned on [ABA] Model Rule 3.8(f), * * * the ABA retreated: it removed the judicial preapproval requirement by deleting both subparagraph (2) and the second sentence of the comment." Pet. App. 4a (citing *Baylson* v. *Disciplinary Bd.*, 975 F.2d 102 (3d Cir. 1992), cert. denied, 507 U.S. 984 (1993)). Indeed, the ABA committee that recommended the change in 1995 noted that there was "a fundamental and widespread doubt about the suitability of Rule 3.8(f) in its current form as a rule of ethics," and that subparagraph (2) in particular "is an anomaly" because "it sets out a type of implementing requirement that is properly established by rules of criminal procedure rather than established as an ethical norm" and "while nominally addressed to the conduct of the prosecutors, subparagraph (2) affects the operation of courts and grand juries." ABA, Standing Committee on Ethics and Professional Responsibility, *Report with Recommendation to the House of Delegates* 7-8 (Aug. 1995).

[5] Originally, Craig C. Donsanto, a member of the Massachusetts bar and Director of the Election Crimes Branch in the Criminal Division of the United States Department of Justice,

exceeded the district court's rulemaking authority under Section 2071 and Federal Rule of Criminal Procedure 57(a)(1), because the Rule is not consistent with two provisions of the Federal Rules of Criminal Procedure. Specifically, respondent claimed that the requirement in Rule 3.8(f)(2) of "prior judicial approval after an opportunity for an adversarial proceeding" conflicts with Federal Rule of Criminal Procedure 6(e), which requires grand jury secrecy, and Federal Rule of Criminal Procedure 17, which governs the issuance of grand jury subpoenas. Respondent informed the court

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joined as a plaintiff in the action. Donsanto was to represent the interests of those federal prosecutors who were members of the Massachusetts bar practicing outside Massachusetts and who therefore might be subject to State Rule 3.8(f) based on subpoenas issued in other jurisdictions. Also, plaintiffs originally named as defendants the Massachusetts Board of Bar Overseers and the Supreme Judicial Court for the Commonwealth of Massachusetts, the state bodies that would hear a state action brought by Bar Counsel under Rule 3.8(f). Pet. App. 5a-6a.

By affidavit dated June 17, 1998, then-Bar Counsel Arnold R. Rosenfeld (petitioner Crane's predecessor) stated that he would initiate any Rule 3.8( ) proceedings against federal prosecutors "pursuant to the applicable Local Rules of [the United States District Court], not before the Board of Bar Overseers or a state court." C.A. App. 98. He also stated that "[p]rosecutors who are members of the bar of the Commonwealth of Massachusetts practicing in a state or federal court outside the Commonwealth who direct the service of a subpoena on a lawyer seeking information about a client will not face any disciplinary action by the Board of Bar Overseers based on Rule 3.8(f)." *Id.* at 99; see Pet. App. 6a. The Supreme Judicial Court for the Commonwealth of Massachusetts then filed a Stipulation of Facts stating that it would hear a 3.8(f) action only as an appeal from the Board of Bar Overseers. C.A. App. 82. Based on those representations, the parties stipulated to the dismissal of Donsanto, the Board, and the Supreme Judicial Court. See *id.* at 101, 102-103.

that his office had suspended the issuance of attorney subpoenas in light of the Rule. Pet. App. 5a.

2. On October 21, 1998, Congress passed an Act entitled Ethical Standards for Attorneys for the Government, and known as the Citizens' Protection Act, Pub. L. No. 105-277, § 801, 112 Stat. 2681-118. The Act is now codified at 28 U.S.C. 530B (Supp. IV 1998). The Act provides that "[a]n attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State."

3. Because all of the district court judges in the District of Massachusetts were named defendants, they were all recused from presiding over the case. C.A. App. 80; see 28 U.S.C. 455(b)(5)(i). Judge Brody of the United States District Court for the District of Maine was designated to preside instead. C.A. App. 81. On January 20, 1999, the district court issued an order and memorandum denying respondent's motion for a preliminary and permanent injunction and for declaratory relief. Pet. App. 32a-50a. Based on that order and memorandum, the court later entered a final judgment for petitioners. C.A. App. 142.

In its order and memorandum, the district court first construed Rule 3.8(f). It noted that Rule 3.8(f) has two parts: Rule 3.8(f)(2), which requires an adversary hearing before a subpoena could be served on an attorney, and Rule 3.8(f)(1), which requires the prosecutor to have a reasonable belief that the information sought is not privileged, that the evidence sought is essential, and that there is no feasible alternative to the subpoena to obtain the evidence. Pet. App. 42a. The court noted that petitioners "do not seriously challenge [respon-

dent's] assertion that Rule 3.8(f) was invalidly adopted if Rule 3.8(f)(2) incorporates the requirements of Rule 3.8(f)(1)," *i.e.*, if the issue at the Rule 3.8(f)(2) adversary hearing is whether the subpoena satisfies the substantive standards of Rule 3.8(f)(1). *Ibid.* The district court, however, adopted state Bar Counsel's contrary interpretation of the Rule, finding that the Rule "does not require that a prosecutor demonstrate the criteria enumerated in 3.8(f)(1) to secure the judicial approval of an attorney subpoena required by 3.8(f)(2)." *Id.* at 43a. The court also noted that the judges of the district court had themselves refused to construe the Rule, but that "[t]o the extent that [respondent's] requests for * * * relief are premised on the *possibility* that other courts will interpret Rule 3.8(f) differently * * * such conflicts appropriately may be resolved at the Circuit level." *Id.* at 44a-45a.

In light of that interpretation of Rule 3.8(f), the district court concluded that the Rule does not conflict with existing federal law. The court noted that the First Circuit had already approved a local rule requiring prior judicial approval—but not imposing any new substantive standards—before a prosecutor could subpoena an attorney in a criminal case.[6] Pet. App. 46a.

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[6] In *Whitehouse* v. *United States District Court for the District of Rhode Island*, 53 F.3d 1349 (1995), the First Circuit upheld a state court rule adopted as a local district court rule by the United States District Court for the District of Rhode Island. The rule provided:

> The prosecutor in a criminal case shall * * * not, without prior judicial approval, subpoena a lawyer for the purpose of compelling the lawyer to provide evidence concerning a person who is or was represented by the lawyer when such evidence was obtained as a result of the attorney-client relationship.

And it decided that the adversarial hearing required by Rule 3.8(f)(2) would "present no more risk of disclosure than did former practice under Rule 3.08 or present practice on a motion to quash" and would therefore not threaten grand jury secrecy. *Id.* at 47a.

The district court adverted to Section 530B briefly at the conclusion of its opinion, stating that "the enactment of 28 U.S.C. [530B] signals Congress's * * * desire that the states and the federal courts play a greater role in governing the conduct of government attorneys." Pet. App. 50a. But the court also acknowledged that "[i]f Rule 3.8(f) is inconsistent with the Federal Rules of Criminal Procedure or federal common law governing a district court's power to regulate a grand jury, as [respondent] alleges, it cannot legitimately be adopted by the District Court," because "section 530B cannot empower district courts to adopt rules governing the behavior of attorneys that squarely conflict with * * * federal law." *Id.* at 37a-38a n.14.

4. The court of appeals reversed. It rejected the district court's "artificial construction" of Local Rule 3.8(f), holding that the Rule required that an attorney

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Id. at 1366. The rule also included a comment stating that "prior judicial approval should be withheld unless" the subpoena satisfies essentially identical standards to those imposed by Rule 3.8(f)(1) of lack of privilege, essentiality, and lack of feasible alternatives. *Ibid.* The First Circuit upheld the Rhode Island rule, but only after concluding that the substantive standards mentioned in the comment are not part of the rule and need not be satisfied for a subpoena to be valid. See *id.* at 1357 (stating that the Rhode Island rule "merely authorizes district courts to reject a prosecutor's attorney-subpoena application for the traditional reasons justifying the quashing of a subpoena"); see also *id.* at 1358 n.12 ("To the extent that the Comment * * * suggests a broader basis for rejecting a subpoena application, we point out that the Comment cannot substantively change the text of the Rule.").

establish the substantive standards of 3.8(f)(1) at the adversarial hearing provided in 3.8(f)(2). Pet. App. 13a. The court of appeals noted that the Rule must be construed as a "unified whole," *ibid.*, and that "the original drafters certainly intended that the two subparagraphs * * * be harmonized, not balkanized," *id.* at 14a. It also observed that the provision for an adversarial hearing would serve "no purpose" if "courts evaluated subpoena applications solely on the basis of traditional motion-to-quash standards." *Ibid.* Since the rule requires an adversarial hearing, "the targeted attorney would have to be told in advance of the content of the testimony or materials sought," thereby "driv[ing] a wedge of distrust between lawyer and client." *Ibid.* The net result "would mirror existing quashal procedure and generate no ethics benefits whatsoever." *Ibid.* Finally, the court observed that it was doubtful that Bar Counsel's "litigation position [regarding the meaning of the Rule] is entitled to any deference," *id.* at 15a, that the district court judges charged with applying the Rule had "pointedly refused to endorse" the interpretation offered by Bar Counsel and adopted by the district court, *ibid.*, and that "any deference that might normally be due is overcome here by the availability of a much more logical reading and a clear statement of the drafters' intent." *Id.* at 15a-16a.

Under the proper interpretation of Local Rule 3.8(f), the court of appeals concluded that the Rule exceeded the district court's rulemaking authority. The court held that the Rule creates "new substantive requirements for judicial preapproval of grand jury subpoenas," and in so doing, "alters the grand jury's historic role, places it under overly intrusive court supervision, curbs its broad investigative powers, reverses the presumption of validity accorded to its subpoenas,

undermines the secrecy of its proceedings, and creates procedural detours and delays." Pet. App. 18a-19a. The court emphasized that this Court had held that "the government could not be required to demonstrate that the materials sought by a grand jury subpoena were relevant," *id.* at 19a (citing *United States* v. *R. Enters., Inc.*, 498 U.S. 292 (1991))—a holding in conflict with the provision of Rule 3.8(f) "[r]equiring a prosecutor to show that subpoenaed evidence is essential and not otherwise feasibly obtainable," *ibid.*

The court of appeals also held (Pet. App. 19a-24a) that Local Rule 3.8(f) was beyond the district court's rulemaking power even outside the grand jury context, because it addressed more than the mere "matters of detail" authorized by Federal Rule of Criminal Procedure 57(a)(1). See Fed. R. Crim. P. 57 advisory committee's notes, cmt. 2; *Miner* v. *Atlass*, 363 U.S. 641, 650 (1960). The requirements of Rule 3.8(f) that a prosecutor establish "essentiality" and "no feasible alternative," the court held, "work changes too fundamental" in the standards governing trial subpoenas under Federal Rule of Criminal Procedure 17 to withstand scrutiny. Pet. App. 21a. Moreover, the court concluded, the Rule would impose "novel requirements that threaten to preclude the service of otherwise unimpeachable subpoenas and thus restrict the flow of relevant, material evidence to the factfinder." *Id.* at 22a.[7]

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[7] As an example of the "fairly typical * * * situation in which a prosecutor might wish to serve an attorney subpoena," the court cited a subpoena seeking billing information from a defense attorney who "received a lump-sum advance payment for services in the precise amount of * * * purloined funds from a client with no visible means of support," where there is "other evidence linking the client to the robbery, so the billing information could

The court of appeals also examined the impact of Section 530B. The court rejected Bar Counsel's arguments that Section 530B "cures any conflict between Local Rule 3.8(f) and other federal law," Pet. App. 24a, explaining that "it simply cannot be said that Congress, by enacting section 530B, meant to empower states (or federal district courts, for that matter) to regulate government attorneys in a manner inconsistent with federal law," *id.* at 24a-25a. The court also held that "Section 530B applies only to ethical standards," and that Local Rule 3.8(f) "is more than an ethical standard" because "[i]t adds a novel procedural step—the opportunity for a pre-service adversarial hearing—and to compound the matter, ordains that the hearing be conducted with new substantive standards in mind." *Id.* at 26a. The court also noted that the ABA committee that recommended repeal of the Rule 3.8(f) provision for an adversary hearing, see note 4, *supra*, acknowledged that "[r]ather than stating a substantive ethical precept, [the Rule sets] out a type of implementing requirement that is properly established by rules of criminal procedure rather than established as an ethical norm." *Id.* at 26a-27a (quoting ABA Standing Committee on Ethics and Professional Responsibility, Report 101, at 7 (Aug. 1995)).

5. The court of appeals denied a petition for rehearing en banc filed by petitioners here. Judge Torruella filed an opinion dissenting from denial of rehearing en banc, joined by two other judges. Pet. App. 28a-31a.

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not fairly be described as 'essential' to the prosecution." Pet. App. 22a. The court explained that "Local Rule 3.8(f) would prohibit the prosecutor from serving a subpoena on the defense attorney, notwithstanding the unarguable materiality and relevancy of the retainer information." *Ibid.*

Judge Torruella stated his belief that the panel opinion was inconsistent with the First Circuit's previous decision in *Whitehouse* v. *United States District Court for the District of Rhode Island*, 53 F.3d 1349 (1995). Pet. App. 28a-30a. He also noted that, under the First Circuit's decision in *United States* v. *Leichter*, 167 F.3d 667 (1999), "recused judges are counted for purposes of determining what constitutes the absolute majority of the active members deemed necessary for en banc hearing." Pet. App. 28a. The First Circuit has six judges in active service, and the votes of four judges are accordingly necessary to obtain rehearing en banc. Judge Lynch was recused, *id.* at 27a, and the two active judges on the panel apparently did not vote to grant rehearing en banc. The votes of the three judges joining in the dissenting opinion were therefore insufficient to grant the suggestion for rehearing en banc.

ARGUMENT

Petitioners contend that, even given the holding of the court of appeals (which they do not challenge) that Rule 3.8(f) conflicts with the requirements of the Federal Rules of Criminal Procedure, 28 U.S.C. 530B renders Rule 3.8(f) valid and enforceable as a regulation of ethics of government attorneys. 00-425 Pet. 10-20; 00-444 Pet. 11-16. Bar counsel also seeks review of the court of appeals' interpretation of Rule 3.8(f). 00-425 Pet. 20-21. Petitioners' claims do not warrant further review.

1. Petitioners claim (00-425 Pet. 10; 00-444 Pet. 14) that this Court should review the court of appeals' determination that Local Rule 3.8(f) is not an "ethical standard" within the scope of Section 530B. They assert that the court of appeals' conclusion creates a conflict with *United States* v. *Colorado Supreme Court*,

189 F.3d 1281 (10th Cir. 1999), which will "allow[] federal prosecutors in Massachusetts to serve subpoenas to lawyers under circumstances that would subject federal prosecutors in Colorado to professional discipline." 00-425 Pet. 10. That contention is incorrect.

a. The court of appeals held that Rule 3.8(f) is not an "ethical standard" within Section 530B because it conflicts with the uniform federal requirements governing subpoena practice in the Federal Rules of Criminal Procedure, interferes with the grand jury, and imposes procedural and substantive requirements on federal practice that extend far beyond the "realm of ethics." Pet. App. 24a-27a. The court found support for that conclusion in the acknowledgement of the ABA that requirements for a judicial hearing and substantive prerequisites for issuance of a subpoena are matters to be "properly established by rules of criminal procedure rather than established as an ethical norm." *Id.* at 27a (quoting ABA Standing Committee, *supra*, at 7).

That holding does not conflict with the holding in *Colorado Supreme Court*. There, the Tenth Circuit addressed a Colorado state rule (adopted by the United States District Court for the District of Colorado as part of its local rules, see 189 F.3d at 1283) governing the issuance of attorney subpoenas. The rule contained substantive standards governing attorney subpoenas in criminal cases that were identical to those in Rule 3.8(f)(1). The rule differed from Rule 3.8(f), however, in important respects. Based on an unappealed district court holding that the Colorado rule's application to the grand jury setting would violate the Supremacy Clause, the Colorado rule as it came before the Tenth Circuit had no application to the grand jury setting. 189 F.3d at 1284. That setting is the primary one in which issues regarding attorney subpoenas arise, and there is plainly

no disagreement between *Colorado Supreme Court* and the decision in this case, see Pet. App. 15a-17a, concerning the application of attorney subpoena rules in that important setting. In addition, as the Tenth Circuit noted, the Colorado rule at issue in *Colorado Supreme Court* did not include a provision for an adversarial hearing, as does Local Rule 3.8(f). 189 F.3d at 1284.

The Tenth Circuit held in *Colorado Supreme Court* that "the question whether [the Colorado rule] violates the Supremacy Clause * * * turns on whether the rule is a rule of professional ethics clearly covered by [Section 530B], or a substantive or procedural rule that is inconsistent with federal law." 189 F.3d at 1284. The court held that the Colorado rule was "a rule of professional ethics," relying on an analysis that classified the rule as an ethical one if it bars conduct "recognized by consensus within the profession as inappropriate," reads "like a commandment dealing with morals and principles," is "quite vague in its nature" in contrast to rules of substantive or procedural law, and "is directed at the attorney herself." *Id.* at 1287. The Tenth Circuit did not consider whether the Colorado rule would alter rules of practice, procedure, or evidence in federal courts or conflict with federal statutes or duly promulgated federal judicial rules. Cf. 28 C.F.R. 77.1(b) (stating that Section 530B "should not be construed in any way to alter federal substantive, procedural, or evidentiary law").

While we disagree with the analysis and result in *Colorado Supreme Court*, it does not conflict with the First Circuit's decision in this case. The court of appeals in this case held that Local Rule 3.8(f) could not qualify as an "ethical standard" under Section 530B because it added the "novel procedural step" of an

adversarial hearing, and "compound[ed] the matter" by imposing new substantive standards on the issuance of subpoenas. Pet. App. 26a. The Colorado rule at issue in *Colorado Supreme Court*, however, did not require an adversary—or any—hearing. Indeed, the Tenth Circuit relied on that fact in concluding that the Colorado rule was valid, explaining as one basis for holding that the Colorado rule was a rule of ethics that it "does not concern itself with the actual procedural steps to satisfy the rule." 189 F.3d at 1288. Accordingly, the Tenth Circuit did not pass on a rule like Rule 3.8(f), and its holding in *Colorado Supreme Court* does not mean that it would conclude that Rule 3.8(f), with its requirement for an adversary hearing, is a rule of ethics.[8]

b. Petitioner Crane argues that further review is warranted because the court of appeals "ignore[d] the plain language of [Section 530B]." 00-425 Pet. 13. Petitioner does not appear to disagree with the court of appeals' conclusion that Section 530B "applies only to ethical standards." Pet. App. 26a. See, *e.g.*, 00-425 Pet. 14 ("[Section 530B] represents the first time Congress has specifically addressed the question of the ethical standards that federal lawyers must obey."). He does disagree with the court of appeals' conclusion that Rule 3.8(f) is not such an "ethical standard." That disagreement, however, cannot be resolved by appeal to the "plain language of [Section 530B]." Indeed, petitioner

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[8] Petitioner Crane also claims (00-425 Pet. 12) that the court of appeals' decision conflicts with its own opinion in *Whitehouse* v. *United States District Court for the District of Rhode Island*, *supra*. The court of appeals in this case distinguished *Whitehouse*, see Pet. App. 17a-18a, rather than overruling it. In any event, further review would not be warranted to resolve an intra-circuit conflict. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

himself offers no alternative to the court of appeals' explanation that Rule 3.8(f) cannot be viewed as a mere rule of ethics, because it imposes new procedural requirements on federal courts and new substantive requirements on the issuance of subpoenas in federal grand jury and other criminal proceedings.[9]

Petitioner Crane asserts that "[i]n enacting [Section 530B], Congress clearly meant to require federal prosecutors to conform their behavior to state and local district court ethical rules even in situations where those rules present some degree of conflict with pre-existing federal law." 00-425 Pet. 18. The court of appeals in this case stated that Section 530B does not "grant[] states and lower federal courts the power, in the guise of regulating ethics, to impose strictures that are inconsistent with federal law," Pet. App. 25a, although its decision also rested on the ground that Rule 3.8(f) was not a genuine rule of ethics under Section 530B in any event, see Pet. App. 26a. No other court of appeals has reached a contrary conclusion regarding the effect of an ethics rule under Section 530B that conflicts with some other federal rule or statute. The only other court of appeals decisions to address Section 530B are *United States* v. *Colorado*

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[9] The court of appeals' opinion does not render Section 530B "superfluous," as petitioner Crane contends. 00-425 Pet. 13. Many state or district court ethical rules do not conflict with any federal law and therefore clearly govern federal attorneys under Section 530B. The mere labeling of a rule by state authorities or a federal district court as an "ethical standard," however, does not make it one. And nothing suggests that Congress intended in Section 530B to give federal district courts (and state authorities) the power to alter or displace fundamental substantive, procedural, and evidentiary rules in federal courts by adopting "ethical rules" governing attorneys in federal courts.

Supreme Court, supra; *United States* v. *Lowery*, 166 F.3d 1119 (11th Cir.), cert. denied, 528 U.S. 889 (1999), and *United States* v. *Condon*, 170 F.3d 687 (7th Cir.), cert. denied, 526 U.S. 1126 (1999). The court in *Colorado Supreme Court* addressed only the question whether the rule at issue in that case was a rule of ethics under Section 530B, and it did not discuss whether the rule before it conflicted with any provision of federal law. See 189 F.3d at 1284. In *Lowery*, the Eleventh Circuit held that a district court could not exclude evidence otherwise admissible under the Federal Rules of Evidence on the basis that it was obtained in violation of a state court "ethical" rule. Accord *Condon*, 170 F.3d at 690 ("Like the eleventh circuit in *Lowery*, we doubt that a [district court's] local rule can require the exclusion of evidence."). Thus, *Lowery* and *Condon* provide support for the court of appeals' conclusion that Section 530B does not authorize a district court to apply a rule that conflicts with existing federal law.

c. Petitioners United States District Court et al. claim that Section 530B "require[s] federal prosecutors to abide by *state* rules governing attorney conduct that are inconsistent with other federal law or rules." 00-444 Pet. 12 (emphasis added). Petitioners argue that, because state prosecutors are required to abide by the Massachusetts Rule of Professional Responsibility governing attorney subpoenas, the rule governs federal prosecutors appearing in federal court, regardless of whether the federal court has adopted or is authorized to adopt the rule as a local district court rule under federal statutory law and the Federal Rules of Criminal Procedure.

Petitioners' claim is not properly before the Court. As explained above, see note 5, *supra*, petitioner Bar

Counsel stated that he would initiate proceedings under Local Rule 3.8(f) only "pursuant to the applicable Local Rules [the United States District Court for the District of Massachusetts], not before the Board of Bar Overseers or a state court." C.A. App. 98. Respondent Stern expressly relied on that statement to dismiss from this action both the Supreme Judicial Court of Massachusetts and the Board of Bar Overseers, the two entities authorized to consider proceedings under the Massachusetts Rules of Professional Responsibility. See *id.* at 101, 102 (dismissals were "based upon the Affidavit of [Bar Counsel]"). The only issue presented to or decided by either court below was therefore whether the United States District Court for the District of Massachusetts has the power to promulgate Local Rule 3.8(f) as a local district court rule. No question regarding the independent force or effect of the state bar rule is properly before this Court.

2. Petitioner Crane claims (00-425 Pet. 20-21) that this Court should review the court of appeals' interpretation of Local Rule 3.8(f), because by "reject[ing] a construction of the rule * * * that would have preserved its validity," the court has "ignore[d] the approach that every other court has taken" to evaluating local district court rules. As the court of appeals noted (Pet. App. 16a), however, there is a point at which a court cannot cure a conflict between a district court rule and federal statutes and rules by interpretation. Even in the far more delicate context in which the rule of constitutional doubt applies—a context that, as the court of appeals noted, "implicate[s] separation of powers or countermajoritarian concerns" not present here, *ibid.*—this Court has repeatedly emphasized that "[a]voidance of a difficulty will not be pressed to the point of disingenuous evasion." *George Moore Ice*

Cream Co. v. *Rose*, 289 U.S. 373, 379 (1933). See, *e.g.*, *Miller* v. *French*, 120 S. Ct. 2246, 2255 (2000); *United States* v. *Locke*, 471 U.S. 84, 96 (1985). Likewise, a court of appeals cannot ignore the plain meaning of a local district court rule to preserve its validity under Section 2071.

In this case, the court of appeals concluded that both the plain meaning of Local Rule 3.8(f) and the drafters' intent dictated reading the Rule to require the establishment of Rule 3.8(f)(1)'s substantive standards at the adversarial hearing prescribed in Rule 3.8(f)(2). A contrary reading, the court held, would not resolve some latent ambiguity, but would instead render Rule 3.8(f)(2) a nullity.[10]

Petitioner points to no case, and we have found none, in which a court of appeals interpreted a district court rule contrary to its plain language. See *John* v. *Louisiana*, 757 F.2d 698, 707 (5th Cir. 1985) ("Obviously, a local rule that is inconsistent *on its face* with the Federal Rules cannot stand." (emphasis added)). The court's refusal to place an "artificial" construction on Local Rule 3.8(f), Pet. App. 13a, in order to preserve its validity, therefore, does not conflict with any other circuit court decision and is in accord with the decisions of this Court.

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[10] The cases relied on by petitioner Crane (Pet. 20-21) all involve ambiguous rules that were clearly open to alternative interpretations. See *Marshall* v. *Gates*, 44 F.3d 722, 725 (9th Cir. 1995) (interpreting a local rule to place a condition on a right guaranteed by federal rules, not to eliminate it altogether); *Jaroma* v. *Massey*, 873 F.2d 17, 20 (1st Cir. 1989) (interpreting the phrase "the court may act on the motion" to allow particular actions, but not others); *John* v. *State of Louisiana*, 757 F.2d 698, 707 (5th Cir. 1985) (refusing to read into local rule a sanction that was not explicitly provided and that would conflict with Federal Rules).

Petitioner Crane also suggests (00-425 Pet. 21) that by failing to adopt the district court's interpretation, the court of appeals did not give proper deference to the district court judges that promulgated the rule. The judges of the United States District Court for the District of Massachusetts, however, specifically *declined* to interpret Local Rule 3.8(f) in the courts below, see Pet. App. 15a, and they do not challenge the court of appeals' interpretation in this Court. Instead, the district court's interpretation was based on the proffer of state Bar Counsel, a litigating position that, as the court of appeals correctly held (*ibid.*), deserves no deference.

In any event, further review would not be warranted to determine whether the court of appeals correctly construed the particular local rule at issue in this case. No other court of appeals has addressed the correct interpretation of that rule. Moreover, if petitioners disagree with the court of appeals' construction of Rule 3.8(f), they retain the authority to promulgate a new rule that clearly embodies whatever lawful construction they prefer.

3. Finally, petitioners United States District Court et al. argue (00-444 Pet. 16) that this Court should review the court of appeals' denial of petitioners' request for rehearing en banc. Further review of that issue is not warranted.[11]

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[11] It is noteworthy that, although Judge Torruella, joined by two other judges, dissented from denial of rehearing en banc in this case and referred to the First Circuit's rule requiring an absolute majority of active judges to grant a petition for rehearing en banc, he did not suggest that that rule was wrong or should be changed. In a similar circumstance involving a decision of the Eleventh Circuit denying rehearing en banc, Judge Carnes recently argued extensively that "there is no good reason why a uniform rule

The First Circuit requires the vote of a majority of all active judges to rehear a case en banc, regardless of whether one or more have recused themselves from consideration of the petition. See *Leichter*, 167 F.3d at 667. The court based that rule on its construction of 28 U.S.C. 46(c), which provides that "[c]ases and controversies shall be heard and determined by a court or panel of not more than three judges * * *, unless a hearing or rehearing before the court in banc is ordered *by a majority of the circuit judges of the circuit who are in regular active service*" (emphasis added). See also Fed. R. App. P. 35(a) ("A majority of the circuit judges *who are in regular active service* may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc.") (emphasis added). In this case, as in *Leichter*, the petition for rehearing en banc failed to garner a majority vote. As petitioners correctly note (00-444 Pet. 17), several other, larger circuits allow a case to be reheard en banc on the majority vote of only non-recused judges.

Petitioners concede (00-444 Pet. 18) that "this Court implicitly rejected the argument that the language of

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should not be followed in all the circuits" and that therefore "Rule 35(a) should be clarified *through amendment*." *Gulf Power Co.* v. *FCC*, 226 F.3d 1220, 1225 (11th Cir. 2000) (emphasis added); see also *id.* at 1221 (absolute majority rule "needs to be changed *by Congress or by the Supreme Court through the Rules Enabling Act*") (emphasis added). He did not, however, suggest that the Eleventh Circuit's absolute majority rule, which mirrors the rule followed by the First Circuit in this case, was incorrect as a matter of interpretation of the current governing statute and rule. (We have filed a petition for a writ of certiorari from the underlying decision of the court of appeals in *Gulf Power*, as has a private party. See *FCC* v. *Gulf Power Co.*, No. 00-843; *National Cable Television Ass'n* v. *Gulf Power Co.*, No. 00-832. Neither petition presents any question regarding the court's en banc procedure.)

§ 46(c) compels a specific method of vote-counting for determining whether a majority of judges in regular active service have ordered rehearing" (citing *Shenker* v. *Baltimore & Ohio Ry. Co.*, 374 U.S. 1 (1963)). In *Shenker*, the Court held that the absolute-majority rule used by the court of appeals here was "clearly within the scope of the court's discretion" and that to hold otherwise "would involve [the Court] unnecessarily in the internal administration of the Courts of Appeals." *Id.* at 5. See also *Moody* v. *Albemarle Paper Co.*, 417 U.S. 622, 626 (1974); *United States* v. *American-Foreign S.S. Corp.*, 363 U.S. 685, 688 (1960).[12] Thus, petitioners' claim is foreclosed.

Petitioners ask (00-444 Pet. 19) that this Court "reexamine" *Shenker* because there are now more courts that grant en banc review based upon the decision of a majority of non-recused judges than there were when *Shenker* was decided. See *Gulf Power Co.* v. *FCC*, 226 F.3d 1220, 1222 (11th Cir. 2000) (Carnes, J., concerning the denial of rehearing en banc) (stating that five circuits now follow the absolute majority rule followed by the First Circuit here, while eight do not); see also note 11, *supra*. Petitioners do not explain, however, why that shift would require the Court to revisit its holding in *Shenker*. The same differences among local en banc procedure existed when *Shenker* was decided. The fact that fewer courts use the absolute-majority rule now

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[12] The problems with prescribing a uniform rule are obvious because the courts of appeals are themselves non-uniform. In the First Circuit, for instance, there are currently six active judges, while in the Ninth Circuit, there are nearly thirty. If the First Circuit were required to convene an en banc court upon the majority vote of only non-recused judges, therefore, the equivalent of a circuit panel (three judges) could force a rehearing en banc whenever even a single judge is recused.

does not affect the conclusion that the courts of appeals may differ on the appropriate rule to govern en banc procedure.[13]

Petitioners also suggest (00-444 Pet. 19) that the different local rules on en banc procedure have "creat[ed] the appearance of rights determined by happenstance" (quoting *Lewis* v. *University of Pittsburgh*, 725 F.2d 910, 920 (3d Cir. 1983), cert. denied, 469 U.S. 892 (1984)). A litigant, however, has no right to have his case heard by the entire court. See *Western Pac. R.R. Corp.* v. *Western Pac. R.R. Co.*, 345 U.S. 247, 252 (1953). Section 46(a) deals "not with rights, but with power." *Id.* at 259; see also *id.* at 250 (statute is "not addressed to litigants. It is addressed to the Court of Appeals."). It allows the court of appeals to oversee its own operations and to prevent internal conflict and incoherence. But it does not *require* the court of appeals to exercise the en banc power in certain situations; it only provides the power to do so if the court wishes. See *NLRB* v. *Cambria Clay Prods. Co.*, 229 F.2d 433 (6th Cir. 1955) (when original appeal was heard by panel of three regular Sixth Circuit judges,

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[13] Petitioners suggest (00-444 Pet. 19 n.9) that this Court should revisit *Shenker* because Congress has since passed "strict financial disqualification rules." Those rules were enacted in 1976. See *Lewis* v. *University of Pittsburgh*, 725 F.2d 910, 930 n.6 (3d Cir. 1983), cert. denied, 469 U.S. 892 (1984). Since then, this Court has consistently denied petitions for certiorari requesting review of the court of appeals' internal en banc procedures. See, *e.g.*, *United States* v. *Nixon*, 827 F.2d 1019 (5th Cir. 1987), cert. denied, 484 U.S. 1026 (1988); *In re Ahlers*, 794 F.2d 388 (8th Cir. 1986), cert. granted limited to other grounds, 483 U.S. 1004 (1987), rev'd on other grounds, 485 U.S. 197 (1988); see also *In re American Broad. Cos.*, 464 U.S. 1006 (1983) (denying petition for writ of mandamus to force en banc review).

court would not consider rehearing case en banc); *United States* v. *Nixon*, 827 F.2d 1019 (5th Cir. 1987) (rejecting argument that if so many judges recuse themselves that it is impossible for an absolute majority to vote for en banc rehearing, litigant is entitled to remedy allowing consideration of suggestion for en banc rehearing), cert. denied, 484 U.S. 1026 (1988). Thus, although a litigant may have a right of notice regarding the court's procedures and a right that the court follow them, *Shenker*, 374 U.S. at 5, he does not have the right to demand certain procedures.

Finally, petitioners complain (00-444 Pet. 20) that the First Circuit's rule "makes the important mechanism of en banc review too rare an occurrence." Before this Court's decision in *Textile Mills Sec. Corp.* v. *Commissioner*, 314 U.S. 326 (1941), however, it was unclear that the courts even had authority to convene en banc. And although en banc hearings are now widely accepted and approved by Section 46(a), "[a]n en banc hearing or rehearing is not favored and ordinarily will not be ordered." Fed. R. App. P. 35(a); see also *American-Foreign S.S. Corp.*, 363 U.S. at 689 ("*En banc* courts are the exception, not the rule."). The Rules and the statute favor the infrequency of en banc review.[14]

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[14] This Court is not the only forum for evaluation of en banc rules. Under 28 U.S.C. 2071(c)(2), the Judicial Conference has the power to modify or abrogate rules promulgated by the courts of appeals. In addition, "general rules of practice and procedure" promulgated by this Court supersede "[a]ll laws in conflict with such rules." 28 U.S.C. 2072(a) and (b). If there is to be reconsideration of appellate en banc procedure, it should be undertaken in the context of a proposal to revise the federal rules, not on certiorari review of the court of appeals' decision in this case. See note 11, *supra*.

CONCLUSION

The petitions for certiorari should be denied.

Respectfully submitted.

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